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IN THE

Supreme Court of the United States

GARRICK BECK AND JOAN KALB,

Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Department of Agriculture has promulgated regulations requiring that persons such as the Petitioners obtain prior written authorization before they gather with more than 73 other persons in the National Forests to pray and exchange and espouse their views.

1. Whether the challenged regulations impose unconstitutional time, place, and manner restrictions on expression because the authorization signature requirement, which imposes an undefined "group liability," is substantially more burdensome than necessary to achieve any legitimate governmental objective?

2. Whether the challenged regulations impose an unconstitutional prior restraint upon expression because, in a number of subtle ways, they leave Forest Service officials with impermissibly broad substantive and procedural discretion in determining whether and how to permit expression?

3. Whether the challenged regulations impose an unconstitutional prior restraint upon expression because they fail to provide for prompt judicial review, as the First Amendment requires following the denial of, or imposition of conditions upon, a license necessary for expression?

PARTIES TO THE PROCEEDING

The Petitioners, Garrick Beck and Joan Kalb, were the Appellants before the United States Court of Appeals for the Third Circuit and were Defendants in the United States District Court for the Western District of Pennsylvania. A third Defendant and Appellant below, Steven Sedlacko, proceeding *in forma pauperis*, has filed a separate petition for a writ of certiorari, docket no. 00-8512, and, for that reason, he is not a party to this Petition. While the courts below entered separate judgments for Beck, Kalb, and Sedlacko, *cf.* App. 1a, 20a, they had each consolidated the cases for litigation and disposition.

The United States of America was the sole Appellee before the United States Court of Appeals for the Third Circuit, and it prosecuted the Defendants in the United States District Court for the Western District of Pennsylvania.

CORPORATE DISCLOSURE STATEMENT

No party to this Petition is a corporation. *Cf.* Rule 29.6

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NOW COME the Petitioners, Garrick Beck and Joan Kalb, and respectfully request that this Court issue a writ of certiorari directed to the United States Court of Appeals for the Third Circuit in order to review the opinion and judgment of that court affirming the Petitioners' convictions for gathering on National Forest land to speak and pray without prior special use authorization to do so.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 234 F.3d 827 (3rd Cir. 2000) and is reproduced at Appendix A of this Petition. App. 1a. That court's judgments were entered on December 12, 2000, the same day as its opinion, so they are not reproduced in the Appendix. Rule 14.1(i)(iv). The opinion of the United States District Court for the Western District of Pennsylvania is reported at 86 F. Supp. 2d 509 (W.D. Pa. 2000), and is reproduced as Appendix B of this Petition. App. 20a.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgments below on December 12, 2000. None of the parties filed any petition for rehearing below. This Court has jurisdiction over this Petition pursuant to Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution appears in Appendix C1 of this Petition. App. 42a. The text of Section 551 of Title 16 of the United States Code, authorizing certain administrative regulations governing the use of the National Forests is reproduced in Appendix C2. App 42a. The relevant portions of the Department of Agriculture's administrative regulations concerning "special use authorizations" for "noncommercial group uses" in the National Forests appear in Appendix C3. App. 43a.

STATEMENT OF THE CASE

The Petitioners, Garrick Beck and Joan Kalb,[1] were convicted in the United States District Court for the Western District of Pennsylvania of violating an administrative regulation codified at Section 261.10(k) of Title 36 of the Code of Federal Regulations. App. 20a, 37a. Promulgated by the Department of Agriculture,[2] this Section

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[1] As noted at ii, *supra*, Steven Sedlacko was also a co-defendant below, and he has a separate certiorari petition pending.

[2] The Department of Agriculture exercises statutory jurisdiction over the National Forest System, and the Forest Service is an administrative agency within that Department. *See, e.g.*, 16 U.S.C. § 551 (1988).

makes it a misdemeanor to use National Forest System lands without special use authorization where such authorization is elsewhere required by law. App. 2a. Other Department of Agriculture regulations expressly require prior, written special use authorization for expressive gatherings on National Forest System lands when the total number of participants and spectators at those gatherings exceeds 74 persons. 36 C.F.R. §§ 251.50, 251.51 (2000); App. 43a-44a.[3] Pursuant to a supporting statute, 16 U.S.C. 551 (1988), the Petitioners were each sentenced to a three-month term of imprisonment, directed to pay a special assessment, and fined $500.00. App 4a.

When the Department of Agriculture promulgated this requirement, governing so-called "non-commercial group uses" of the National Forests, it was fully aware that it regulated prospective activities on National Forest System lands which are presumptively protected by the First Amendment to the United States Constitution. *See* 60 Fed. Reg. 45,257-95 (August 30, 1995)(assessing final rule under, *inter alia*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) and *Thomas v. Review Board*, 450 U.S. 707 (1981)).[4] Indeed, the specific substantive requirements under which the Petitioners were convicted below replaced

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[3] As the Court of Appeals recognized below, App. 3a n. 2, a non-substantive recodification changed the numbering of some of the relevant regulations in late 1998. 63 Fed. Reg. 65949-69 (Nov. 30, 1998). This Petition continues the lower courts' use of the section numbers which were in effect when the current regulatory language was promulgated, although Appendix C also specifies the current section numbers, where different, in brackets.

[4] The United States has never seriously disputed that the National Forest System lands on which rainbow gatherings occur constitute a public forum for expression. *Cf. United States v. Rainbow Family*, 695 F. Supp. 294, 308-309 (E.D. Tex. 1988); 60 Fed. Reg. 45,262 ("noncommercial group use is an appropriate use of National Forest System lands and exercise of First Amendment rights is extremely important . . ..").

prior administrative regulations which had been invalidated as unconstitutional prior restrains upon expressive gatherings identical to the one which gave rise to this litigation. *See United States v. Rainbow Family*, 695 F. Supp. 294, 309-12 (E.D. Tex. 1988); *Id.* 695 F. Supp. 315, 322, 332 (E.D. Tex. 1988); *see also* 60 Fed. Reg. 45,258-59, 45,260-89 (commenting on prior litigation and extensively discussing "Rainbow Family Gatherings" held on National Forest System lands).

As both the Department of Agriculture and the lower federal courts recognize, the "Rainbow Family of Living Light," *cf.* App. 21a, regularly gathers on remote and undeveloped National Forest System land "to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express, and demonstrate [the] ideas and views" of those who gather. App. 3a n. 1; 21a, *quoting Black v. Arthur*, 18 F. Supp. 2d 1127, 1130 (D. Ore. 1998), *aff'd* 201 F.3d 1120 (9th Cir. 1999); *see also United States v. Johnson*, 159 F.3d 892, 895 (4th Cir. 1998). This use of undeveloped National Forest System land reflects the gatherers' concern for the environment, their reverence for the "cathedral of nature," their commitment to lands held in trust for the public, and their determination to demonstrate the success of communities which arise and actually operate on the basis of common consent. *Black v. Arthur*, 18 F. Supp. at 1130; *United States v. Rainbow Family*, 695 F. Supp. at 299, 308; *Id.* at 322-23; 60 Fed. Reg. 45,260, 45,262. At least one such "national gathering" has occurred every year since 1972, and presently several regional gatherings occur throughout the United States each year. App. 21a.

The Petitioners were charged and convicted for attending the 1999 Annual Rainbow Gathering in Pennsylvania's Allegheny National Forest. App 22a. It is undisputed that more than 75 participants and spectators

were present at that gathering and that no one had obtained a prior special use authorization for that gathering. App. 21a, 28a-31a.

The Petitioners defended below on, *inter alia*, the grounds that the prior special use authorization requirement is facially invalid because it imposes an unconstitutional prior restraint upon their expression and religious worship. If more than 73 other persons gather for these purposes with any one of the Petitioners, the Forest Service will define that gathering as a "noncommercial group use" of National Forest lands. 36 C.F.R. § 251.51; App. 44a. The special use regulations then require that before any such use is made of National Forest System lands, a formal, written permit, known as an "authorization,"[5] must be obtained from the Forest Service. 36 C.F.R. § 251.50(a); App. 43a-44a. The Petitioners' prior restraint challenge is principally, though not entirely, directed to two features of the Forest Service's permit system.

First, while the challenged regulations do not require that an application for a group use authorization be signed by anyone, 36 C.F.R. § 251.54(e)(2)(i) [now § 251.54(d)(2)(i)]; App. 46a-47a,[6] they do require that the authorization

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[5] While this Petition will follow the regulation's use of the general term "special use authorization" (or "authorization" for short), the authorizations at issue here represent official permission required in advance of expression. For this reason, the Petitioners contend that they are the functional equivalent of the parade permits at issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992),and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and the motion picture licenses at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965). The lower courts assessing the regulations at issue here have used the terms "authorization," "permit," and "license" interchangeably.

[6] Despite the absence of any regulatory language requiring it, the Forest Service has prepared application forms and insisted that they be signed as well. *See* App. 29a.

itself be signed by someone formally designated by the permit holder, *Id.* § 251.54(h)(1)(viii) [§ 251.54(g)(3)(ii)(H)]; App. 47a-48a, and they apparently contemplate, though they do not expressly require, that the signer must sign as an "agent for the group" which will use the authorization, *see, e.g.,* 60 Fed. Reg. 45274 (August 30, 1995)(final rule-making, response to comments). In any event, this special signature requirement is no accident, for the Forest Service and the courts below believe that presence of the applicant's signature on the authorization itself will impose upon the using "group" certain liabilities which would not otherwise exist under applicable law. *E.g.* App. 10a, *quoting United States v. Masel,* 54 F. Supp. 2d 903, 919 (W.D. Wis. 1999); 60 Fed. Reg. 45,274, 45,286. These liabilities arise, at least in part, from additional but unspecified terms and conditions[7] which Forest Service officials are left free to place upon the written authorization itself.

The second major prior restraint concern raised by the special use regulations focuses on the very limited provisions for judicial review of any denial of an authorization or of any burdensome terms or conditions which the Forest Service might attach to an issued authorization. With respect to an outright denial of a requested authorization, Section 151.54(h)(2) [§ 251.54(g)(3)(iii)]; App. 48a, expressly provides that "[a] denial of an application under paragraphs (h)(1)(i) through (h)(1)(viii) [(g)(3)(ii)(A) through

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[7] At the time the Petitioners were cited below, the regulations expressly provided, without further elaboration, that an issued authorization could contain such "terms and conditions as the [issuing] officer deems necessary to . . . (vii) otherwise protect the public interest." *See* App. 17a n. 9; 36a; *cf. U.S. v. Linick,* 195 F.3d 538, 541 n. 3 (9th Cir. 1999). After the Petitioners in this case were cited, App. 36a, the Department of Agriculture promulgated an interpretive rule restricting bases upon which conditions may be attached to authorizations. *Id.* at 542; 64 Fed. Reg. 48,959 (September 9, 1999).

(g)(3)(ii)(H)] of this section constitutes final agency action and is immediately subject to judicial review."[8] Although the regulations are silent concerning judicial review of a dispute over conditions attached to an issued authorization, the court of appeals below read the regulations to allow for similar action by a disappointed applicant. App. 18a. Thus, these regulations effectively place the burden of seeking any judicial review upon the applicant, rather than upon the Forest Service, and they remain altogether silent about the proceedings on review.

The courts below rejected the Petitioners' prior restraint challenges to the special use authorization regulations for a number of reasons. In particular, the Court of Appeals concluded that, because the "special use authorization scheme in general and the terms and conditions provision in particular," App. 14a, apply to both expressive and other special uses of National Forest System land, they are "closer to a law of general application," App. 14a, *quoting United States v. Masel*, 54 F. Supp. 2d 903, 914 (W.D. Wis. 1999), than to a prior restraint system. For this reason, it concluded that "[t]he terms and conditions provision does not permit the Forest Service to ban disfavored speech." App. 14a.

> Although we acknowledge that there is some theoretical possibility that the terms and conditions provision could be invoked to chill protected speech, we are not persuaded that "[t]he risk that Forest Service officials will use nefariously any discretion afforded to them by the . . . provision is . . . great enough to justify invoking [prior restraint scrutiny]" [*Masel*] at 914.

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[8] Similarly, Section 251.60(a)(1)(ii); App. 49a, provides that the revocation or suspension of an issued authorization is final administrative action subject to immediate judicial review.

App. 14a-15a (internal quote and citation omitted). The Court of Appeals also concluded that the "terms and conditions provision" could survive prior restraint scrutiny because the provision contemplated the imposition of terms and conditions which furthered only nonexpression-related government interests. App. 15a-17a.

For these reasons, the Court of Appeals affirmed the Petitioners' convictions. The trial court has stayed all aspects of the Petitioners' sentence – including the three months' period of incarceration – pending completion of appellate review.

REASONS FOR GRANTING THE PETITION

I. When Faced with a Regulation Requiring Official Permission in Advance of Expression, the Circuits Are Divided Over When to Apply Prior Restraint Scrutiny and Over the Constraints Which the First Amendment Imposes Upon Systems of Prior Restraint.

The administrative regulations under which the Petitioners were convicted below require prior, written official approval before groups of 75 or more persons may gather on National Forest System land to pray or to express and exchange their views. 36 C.F.R. §§ 251.50, 251.51 (2000); App. 43a-44a. In this sense, the regulations impose a literal prior restraint upon expression. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). In this sense, too, the challenged regulations are similar to parade permit ordinances, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), park permit ordinances, *Niemotko v. Maryland*, 340 U.S. 268 (1951), regulations requiring prior authorization before using public sidewalks or plazas for charitable, religious, or political canvassing, *Riley v. National Federation of Blind*, 487 U.S. 781 (1988),

rules requiring approval of a government agency prior to the use of a performance space which it operates, *Southeastern Promotions*, 420 U.S. 546, and statutes requiring motion picture licensing, *Freedman v. Maryland*, 380 U.S. 51 (1965). This Court has long recognized that the First Amendment imposes special constraints on all such regulations in order to ensure that licensing officials will not manipulate the prior approval requirement to accomplish indirectly what they cannot constitutionally accomplish directly. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-62 (1988).

As detailed at 10-12, *infra*, the lower courts are divided on when to apply the constitutional tests which this Court has articulated for prior restraints; and, under those tests, they differ about how much and what kind of substantive and procedural discretion can be left in the hands of an official or agency which issues licenses necessary for expression. The lower courts have also come to different conclusions, as detailed at 13-21, *infra*, concerning the First Amendment's requirements governing judicial review in the event that a licensor's decision disappoints an applicant who seeks to speak. The United States Court of Appeals for the Third Circuit resolved each of these issues below, as noted at 7-8, *supra*, often deliberately departing from the resolution previously reached by a sister circuit. As argued at 21-29, *infra*, the Third Circuit's conclusions on these important matters also conflict with the relevant decisions of this Court. For all of these reasons, this case presents this Court with a particularly good opportunity to resolve important current questions surrounding prior restraints. Under Rule 10(a) and (c), then, this case warrants the exercise of this Court's powers of discretionary review.

A. The Circuit Courts of Appeals Are Divided Over When to Apply the Prior Restraint Scrutiny Articulated by this Court.

In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), this Court invalidated a municipal ordinance requiring prior official permission for the placement of newsracks on the public sidewalks. The ordinance left the Mayor with unbridled discretion to grant or deny such permission, *Id.* at 769, 771, and to place conditions on the use of such newsracks as were allowed, *Id.* at 769. Following a long line of prior decisions, this Court held that the ordinance imposed an unconstitutional prior restraint upon expression. *Id.* at 772. This Court thus recognized that where the government requires prior case-by-case permission for "expression or [for] conduct commonly associated with expression," *Id.* at 759, the dangers of abuse require that the licensor's discretion be carefully constrained in advance, *Id.* 755-59. At the same time, this Court recognized that "laws of general application" not aimed at expression or related conduct and not permitting evaluation of the content of on-going or future expression do not impose presumptively invalid prior restraints. *Id.* at 760-61.

Under *Lakewood*, the Ninth Circuit – properly in the Petitioners' view – has evaluated the challenged noncommercial group use regulations as prior restraints on expression or on conduct commonly associated with expression, and it has accepted or imposed narrowing constructions on those regulations in order to avoid their invalidation as such. In *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999), for instance, the Ninth Circuit accepted a narrowing construction contained in an interpretive regulation, *see* 64 Fed. Reg. 48,959 (September 9, 1999), as restricting the bases upon which the Forest Service can impose conditions on an authorization issued for a noncom-

mercial group use of National Forest land. *Id.* at 542-43. Similarly, in *Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000), that court additionally interpreted the challenged regulations to strictly limit the liability which might arise from a violation of any conditions so imposed. *Id.* at 1123-24. Each of the *Black* court's interpretations substantially reduced the Forest Service's ability to chill presumptively protected expression, *Id.* at 1123, and each such narrowing construction was predicated upon an express concession which the United States made at oral argument in that case, *Id.* at 1123-24.

In this case, the Third Circuit sharply rejected the Ninth Circuit's approach to the challenged regulations. App. 15a, 17a n. 9. Indeed, this rejection was critical to the outcome below, because, as the trial court had recognized, the interpretive regulation was not promulgated until after the Petitioners had been cited in this case. App. 36a. If the regulations imposed an unconstitutional prior restraint without that interpretive regulation, then this Court's decision in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-58 (1969)(invalidating conviction for unlicensed protest march where narrowing construction was imposed upon permit requirement *after* the march had occurred), would thus require reversal of the convictions and sentences at issue here.

Nevertheless, both of the courts below deliberately rejected the argument that the challenged regulations are subject to prior restraint scrutiny. App. 15a, 37a. Following, *United States v. Masel*, 54 F. Supp. 2d 903, 914 (W.D. Wis. 1999), the Third Circuit concluded that the challenged "special use authorization scheme" is "closer to a law of general application," than to a prior restraint system. App. 14a. To be sure, many "special uses" of National Forest System land have nothing to do with expression. *Cf.* 36 C.F.R. § 251.50; App. 43a. But the regulations at issue here

carefully single out "noncommercial group uses" for special consideration, 36 C.F.R. § 251.54 – undoubtedly because the government knows full well that *this* subcategory of special uses is, in fact, dominated by "expression or conduct commonly associated with expression." *See, e.g.*, 60 Fed. Reg. 45,257-89 (evaluating final rule under First Amendment standards and almost exclusively discussing expressive "noncommercial group uses"). Indeed, the very definition's use of the term "participants or spectators," 36 C.F.R. § 251.51; App. 44a, expressly contemplates expressive activity. At least where, as here, there has been no showing that a substantial number of nonexpressive uses will provided a "yardstick," *cf. Lakewood*, at 761, against which to measure the licensor's treatment of expressive ones, the courts should treat a prior permission requirement so plainly crafted with expression in mind as a prior restraint rather than as a law of general application.[9]

This case thus presents this Court with an opportunity to clarify for the lower courts when a prior license requirement should be treated as a prior restraint even though it may require licensing of some nonexpressive as well as expressive activities. *Cf. FW/PBS v. City of Dallas*, 493 U.S. 215, 224 (1990)(invalidating licensing system as prior restraint even though it applied to some nonexpressive uses because it "largely targets" expressive ones).

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[9] A similar situation arises when courts are called upon to evaluate "amusement" licensing ordinances, which typically include both expressive and nonexpressive, participatory amusements within their scope. *See, e.g., Admiral Theatre v. City of Chicago*, 832 F. Supp. 1195, 1202 (N.D. Ill. 1993)(reviewing "public place of amusement" license ordinance as prior restraint on expression).

B. The Circuit Courts of Appeals Are Divided Over the First Amendment's Requirements for Judicial Review Following the Denial of a License Necessary for Expression. This Court Had Granted Certiorari to Resolve this Conflict in a Case that Was Ultimately Dismissed as Moot Earlier This Term.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court invalidated a statute that required motion picture exhibitors to obtain a prior license from a review board for each film shown in the state. This Court held that whenever the government imposes a prior restraint upon free expression – such as a license or permit requirement – that scheme must contain three procedural safeguards. The last of these safeguards requires prompt judicial review if a license is denied. *Id.* at 59; *see also, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)(plurality opinion) ("there must be the possibility of prompt judicial review in the event that the license is erroneously denied"); *accord Id.* at 238 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in judgment).

1. This Court must determine what constitutes prompt judicial review.

In *Freedman*, this Court made it clear that the term "prompt judicial review" means more than mere prompt access to the judicial system:

> Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's

> view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan,* [372 U.S. 58 (1963)]. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Freedman, at 59.

Several of the circuits have departed from this articulation of the requirement of prompt judicial review. Even in cases, such as this one, involving core political and religious expression, these circuits no longer require that a system of prior restraint provide for a prompt judicial disposition of a challenge to a denial of a license necessary for expression. Instead, these circuits require only that the applicable general law provide for prompt access to a reviewing court, as by a proceeding for a common law writ of certiorari. Other circuits, however, have recognized – properly in the Petitioners' view – that the First Amendment requires more than mere access to the courts: when an administrative official or agency denies a license necessary for expression and a disappointed applicant seeks judicial review, the law must provide for prompt judicial action.

As this Court recognized in *City News & Novelty, Inc. v. City of Waukesha,* 69 U.S.L.W. 4081, 4082 (January 17, 2001)(dismissed as moot), a serious split has now developed among the circuits concerning just what the First Amendment requires of prompt judicial review in the context of a prior restraint upon expression. Only this Court can resolve that split.

One side of the conflict is exemplified by *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993)(en banc), *cert. denied,* 511 U.S. 1085 (1994). The plurality opinion in that case

concluded that the First Amendment and *Freedman* require no more than that a speech-licensing system allow, by operation of general law, for prompt access to a reviewing court. *Id.* at 1324-25. Five judges, however, disagreed with the five-member plurality on this point, *Id.* at 1330-31 (Flaum, J., joined by Cudahy, J., concurring in judgment), 1340-41 (Cummings, J., joined by Bauer and Fairchild, JJ., dissenting), and two judges expressed no opinion, *Id.* at 1333-35 (Ripple, J., joined by Rovner, J., concurring in judgment). There was thus no holding on this point. Nevertheless, a later Seventh Circuit panel understood *Graff* to hold that "[t]he opportunity to apply for . . . [a common law] writ [of certiorari] is enough . . . even when rights under the first amendment are at stake." *River Park, Inc. v. City of Highland Park*, 23 F. 3d 164, 167 (7th Cir. 1994). *See also Thomas v. Chicago Park District*, 227 F.3d 921, 927-28 (7th Cir. 2000).

The First and Fifth Circuits join the Seventh in holding that the First Amendment merely requires an opportunity for prompt access to a reviewing court following an administrative denial of a license necessary for expression, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994)(per curiam), although the Fifth Circuit has expressed some ambivalence, *TK's Video*, at 709:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period.

On the other hand, the *Graff* plurality's suggestion concerning prompt judicial review has been deliberately rejected in other circuits. It was quickly criticized by a majority opinion of another circuit sitting en banc. In *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 994 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1010 (1995), the Fourth Circuit expressly held that a prompt judicial determination is required. Similarly, in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995), the Sixth Circuit also rejected the argument that mere access to judicial review satisfies the requirement of prompt judicial review. While observing that "the Supreme Court has not expressly defined prompt judicial review," the Sixth Circuit recognized that even if judicial access were immediate in that case, "a permit applicant would still have to wait three to five months for judicial review," *Id.* at 225, and concluded that such a delay could not satisfy the prompt judicial review requirement. The Ninth Circuit has also rejected *Graff's* judicial review requirement as "meaningless" since one facing any kind infringement on protected speech already has immediate access to a judicial forum. *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998); *see also 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999).[10]

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[10] The situation is unsettled in the Second and Eleventh Circuits. *Compare Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999)(prompt access to courts by common law certiorari would satisfy the constitutional requirements), *with MacDonald v. Safir*, 206 F.3d 184, 195 (2nd Cir. 2000)(common law certiorari procedure might not satisfy prompt judicial review requirement if it does not mandate a prompt judicial decision); *compare Redner v. Dean*, 29 F.3d 1495, 1500-1501 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995)(apparently rejecting the "prompt judicial access" position), *and Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761, 774-75 (11th Cir. 2000)(requiring prompt judicial decision for licenses involving core political expression), *with Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255-57

In its decision below, the Third Circuit joined those circuits which hold that prompt access to a court is sufficient under the First Amendment. Assuming, in part of its opinion that prior restraint scrutiny is appropriate, App. 15a, it upheld the challenged regulations upon concluding that any administrative action adverse to the applicant – including the attachment of burdensome conditions to an issued authorization – amounts to final administrative action subject to immediate judicial review. App. 18a. But because the challenged regulations are altogether silent concerning how promptly matters must move once in court, the Third Circuit was content to leave applicants with prompt access, rather than the prompt judicial determination expressly required in *Freedman*.

This Court has long recognized the importance of judicial review in safeguarding those subject to a speech licensing system from predictable abuse. Especially now that *Waukesha* has been dismissed, this Court should grant the instant Petition and resolve the differences which have arisen concerning this critical element of prior restraint scrutiny.

2. This Court must also determine who bears the burden of initiating judicial review.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court made clear that a valid motion picture licensing scheme must assure exhibitors that the licensing official or agency "will, within a specified brief period of time, either issue a license or go to court to restrain showing the film." *Id.* at 59. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court effectively relaxed one of these specific requirements in the context of a licensing scheme under

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(11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000)(prompt access sufficient at least for adult business licensing ordinances).

which entire businesses were licensed.[11] Distinguishing *Freedman*, which involved licensing for individual motion pictures, the *FW/PBS* plurality noted that "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *Id.* at 229-30 (plurality opinion); *accord Id.* at 244 (White, J. and Rehnquist, C.J., concurring in relevant part). For this reason, this Court held that the government need not bear the burden of going to court when it denies a license which is required for the operation of an entire business.

In the wake of *FW/PBS*, the circuits are divided over whether the government must bear the burden of going to court after a denial of a permit for a single expressive event such as a single protest march or, in this case, one of the several gatherings which are conducted in different National Forests throughout a typical year, *cf.* App. 21a.

In a case involving a permit required for a single political event, for instance, the Eleventh Circuit recognized and applied, properly in the Petitioners' view, the foregoing *Freedman-FW/PBS* distinction:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. . . . The right to speak sought by CAN in this instance deserves greater protection than that outlined [for adult businesses] by the plurality in *FW/PBS*. Accordingly, we decline to

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[11] Actually, *FW/PBS* relieved the government of two burdens under the circumstances of that case: 1) the burden of initiating judicial review, for the reason described in text immediately *infra*, and 2) the burden of justifying its adverse licensing decision once in court, for the reasons described at 20, *infra*.

> relieve the City of the requirement that its Street Closing Ordinance meet *Freedman's* first procedural safeguard.

Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 776 (11th Cir. *2000*).

Yet in a case presenting very similar facts, the Seventh Circuit expressly left it to a disappointed permit applicant to initiate and pursue judicial review:

> If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek . . . a preliminary injunction.

Thomas v. Chicago Park District, 227 F.3d 921, 927 (7th Cir. 2000). In so holding, the Seventh Circuit was motivated by its belief that *Freedman* "requires only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems." *Id.* at 926, *citing FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228-230 (1990)(plurality opinion); *Id.* at 244 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part); *Id.* at 249 (Stevens, J., concurring in part and dissenting).

Yet the outcome of *FW/PBS* would have been entirely different under the Seventh Circuit's reasoning.[12] In that

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[12] Indeed, only two Justices in *FW/PBS* subscribed to the Seventh Circuit's present position, *FW/BBS* at 244 (White, J., joined by Rehnquist, C.J.), and they expressly *dissented* from the portion of the plurality opinion which discussed and applied *Freedman* to the licensing scheme then before this Court. *Id.* at 249.

case, this Court expressly recognized that the licensing system at issue did *not* permit government control over the content of the licensed expression, *Id.* at 229 ("the City reviews the general qualifications of each applicant, a ministerial action that is not presumptively invalid"), but it nevertheless invalidated the system as an unconstitutional prior restraint in part because it lacked sufficient provisions for judicial review, *Id.* 229 ("Dallas scheme . . . also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of license denial"). To be sure, the limited nature of the licensor's inquiry in that case relieved the government of the burden of justifying an adverse licensing decision in court, but *it* did not dispense with the need for the government to go to court in the event of a license denial. *Cf. supra*, at 18. Even if a speech licensing system is established merely to implement time, place, and manner concerns, it must pass constitutional muster as a prior restraint. *See generally Id.* at 223 ("Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue . . . whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction"); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

In this case, too, the Third Circuit left the burden of initiating judicial review on the applicant. App. 18a (upholding challenged regulations upon finding that any adverse administrative decision is subject to immediate judicial review). But unlike the adult businesses involved in *FW/PBS*, those who attend – and even those who take an active role in supporting – gatherings of the sort these Petitioners attend are unlikely to have a strong incentive to seek judicial review of an adverse authorization decision concerning any *particular* gathering. In the first place, as the government concedes in the title of the challenged regulations, these gatherings are "*non*commercial group

uses" (emphasis added), so any economic motive present in *FW/PBS* is absent here. Secondly, the trial court expressly found that not one but several "Rainbow Gatherings" are held across the United States in any given year. App. 21a (referring to "regional" gatherings). Much like an exhibiter considering presenting a particular motion picture, *cf. Freedman* at 59, then, those who would take an active role in supporting a gathering at a particular location might be tempted to forego a challenge to an adverse authorization decision and simply gather in another National Forest elsewhere in the country. Under such circumstances, though, potential attendees who can travel only limited distances to these gatherings would be deprived of the ability to share in the religious communion and the exchange of ideas which a more local gathering would offer them.

This case thus presents this Court with an opportunity to clarify for the lower courts just when licensing officials, as opposed to disappointed license applicants are required to "go to court" to enforce a denial of a license necessary for speech.

II. The First Amendment Prohibits the Enforcement of the Forest Service's Noncommercial Group Use Regulations Against the Expressive and Religious Gatherings Which the Plaintiffs Attend.

The United States attempts to justify the challenged regulations as mere time, place, and manner regulations on expression. Indeed, the government must show, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994), these regulations pass constitutional muster as such by establishing that they "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternate channels of communication." *United States v. Grace*, 461 U.S. 171, 177

(1983). Beyond this, when, as here, the government implements time, place, and manner concerns by imposing a prior case-by-case permission requirement on expression, it must additionally justify the arrangement as a prior restraint. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). This requires that the government rebut the "heavy presumption" against the constitutionality of such restraints, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), by establishing that the challenged regulations narrowly constrain the substantive discretion placed in the hands of licensing officials with "narrow, objective, and definite standards," *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), and that tight procedural requirements constrain the processing of any requests for such permission, *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

For the reasons outlined *infra*, the United States cannot justify the challenged regulations either as time, place, and manner regulations or as prior restraints on the expression of the Petitioners and those with whom they gather to pray and express and exchange their views and ideas. For this reason, the Petitioners' convictions and sentences cannot stand.

A. The Challenged Regulations Cannot Stand as Time, Place, and Manner Restrictions Because the Authorization Signature Requirement Is Substantially More Burdensome than Necessary to Achieve Any Legitimate Governmental Objective.

The requirement that at least one "agent for the group," 60 Fed. Reg. 45,274 (August 30, 1995), actually sign the authorization itself, 36 C.F.R. § 251.54(h)(1)(viii) [§ 251.54 (g)(3)(ii)(H)]; App. 47a-48a – as opposed to an application for that authorization, 36 C.F.R. § 251.54(e)(2)(i) [§ 251.54

(d)(2) (i)]; App. 46a-47a – fails as a mere time, place, and manner regulation of expression because it is not narrowly tailored to serve any legitimate governmental interest. *Cf. United States v. Grace*, 461 U.S. 171, 177 (1983). While the "narrow tailoring" requirement does not demand that the government choose the least restrictive means of achieving its objectives, it does prohibit the government from "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1988).

The challenged authorization signature requirement is indeed substantially more burdensome than necessary to serve any legitimate interest of the United States. Any concern about maintaining official contact with particular individuals throughout the application process, for instance, can be satisfied by requiring that a contact person be identified on the application. Similarly, any interest in combating fraud in connection with an application could be implemented by requiring verification of the *application*, since this is, after all, where the applicant provides potentially critical information to the government. The *authorization* signature requirement, though, is uniquely justified, as the court below expressly recognized, App. 10a, because the signature of the group's agent on the authorization it imposes upon the using "group" certain liabilities which would not otherwise exist under applicable law, *see* 60 Fed. Reg. 45,274, 45,286, in particular, liabilities which arise from the conditions which the Forest Service is left free to place upon the written authorization itself.

The challenged regulations, however, leave the nature and extent of this liability altogether undefined; and *this* is precisely why the application signature requirement is substantially more burdensome than a prior restraint system which does not require the user's signature on the authorization itself. This Court has long recognized that,

because of the chilling effect which vicarious liability can have on expression and expressive association, the First Amendment imposes strict limitations on the government's ability to hold an individual or group liable for the wrongs which another might commit in the course of an expressive association. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *DeJonge v. Oregon*, 299 U.S. 353 (1937). Yet this is precisely why the government demands a holder's agent's signature on the authorization itself. But in light of the undefined nature of this liability in general[13] and Forest Service's ability to vary specific conditions on a case-by case basis, the authorization signature requirement falls far short of the "precision of regulation" which this Court has demanded where issues of group liability arise in the context of presumptive protected expression. *Cf. Claiborne Hardware* at 916. Even as a time, place, and manner regulation, then, the authorization signature requirement must fall.

B. The Challenged Regulations Impose an Invalid Prior Restraint Because, in a Number of Subtle Ways, they Leave Forest Service Officials with Impermissibly Broad Substantive and Procedural Discretion in Determining Whether and How to Permit Expression.

The challenged regulations also fail when analyzed as prior restraints upon expression. Indeed, the undefined nature of the authorization signature liability as well as the government's ability to vary, from case to case, the conditions giving rise to that liability, *see supra* at 22-24,

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[13] In view of its rejection of the Ninth Circuit's approach to these regulations, App. 15, 17 n. 9, the Third Circuit made no effort below to narrowly construe the scope of this liability *cf. Black v. Arthur*, 201 F.3d 1120, 1123 (9th Cir. 2000)(limiting "group liability" to permit revocation), and even if it had, that narrowing construction would have come too late to save the convictions at issue here.

pose insurmountable constitutional obstacles here given that prior restraint systems must be fettered by "narrow, objective, and definite" substantive standards. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). In other words, the government may not escape the appropriate constitutional scrutiny merely by playing a legislative or administrative game of 'hide the discretion.' Insufficiently fettered discretion in *either* the standards for evaluating applications *or* the conditions which may be placed upon issued licenses will doom a speech licensing system. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988).

The authorization signature requirement is not the only place in which the government has subtly hidden the remaining discretion which the challenged regulations afford to Forest Service officials. In light of the constitutional requirement of prompt administrative action on applications for advance permission for expression, for instance, the challenged regulations require that Forest Service administrators evaluate a noncommercial group use application within 48 hours of its submission. 36 CFR § 251.54(f)(5) [§ 251.54(g)(3)(i)]; App. 47a. Indeed, the current regulations further provide that an authorization is automatically granted unless the authorized officer denies the application within the allotted time. *Ibid.* At first glance, this appears to guarantee sufficiently prompt administrative processing, but the regulation then subtly *undoes* this apparent guarantee by providing that, even if a Forest Service officer affirmatively grants an authorization within the allotted period, he or she may later *revoke* it for any reason which would have permitted denial in the first place. 36 CFR §§ 251.54(f)(5) [§ 251.54(g)(3)(i)], 251.60 (a)(1)(i); App. 47a, 49a. There is simply no point to a requirement that an official quickly decide whether to grant or deny an authorization if he or she can then spend the following days or weeks searching for a reason – which

could not be found within the allotted time – to deny, and therefore to revoke, an authorization. Indeed, such later revocation of an already issued authorization would effectively delay judicial review by delaying the adverse decision on an application.[14]

The Department of Agriculture promulgated the challenged regulations after previous permit requirements had been invalidated as unconstitutional prior restraints on the very sort of expressive gatherings at issue here. *See United States v. Rainbow Family*, 695 F. Supp. 294, 309-12 (E.D. Tex. 1988); *Id.* 695 F. Supp. 315, 322, 332 (E.D. Tex. 1988); *see also* 60 Fed. Reg. 45,258-59 (noting prior litigation). No doubt the government tried hard to shield these replacement regulations from the constitutional scrutiny which had proved fatal to earlier versions. But whether through inadvertence or an attempt at indirection, the government has failed to cure the constitutionally fatal deficiencies: insufficiently fettered substantive and procedural discretion remains, and the challenged regulations cannot stand.

C. The Challenged Regulations Impose an Invalid Prior Restraint Because they Fail To Provide for the Prompt Judicial Review Which the First Amendment Requires Following the Denial of a License Necessary for Expression.

In promulgating the challenged regulations, the government recognized that the First Amendment requires prompt judicial review of any adverse decision of its administrators concerning an application for a noncommercial group use authorization. It has thus expressly provided that a denial of an application for a special use authoriza-

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[14] In addition, such a revocation would cause very substantial logistical, safety, and other issues in the context of the large, remote gatherings which the Plaintiffs attend.

tion for a noncommercial group use is a final administrative action subject to immediate judicial review,[15] 36 C.F.R. § 151.54(h)(2) [§ 251.54(g)(3)(iii)]; App. 48a – *if*, but *only* if, the disappointed applicant undertakes to haul the government into court.

But that provision falls short of the clear constitutional requirement that regulation provide, expressly or by "authoritative judicial construction that the [licensor] will, within a specified brief period, either issue a license or go to court to restrain" the planned expression. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). The requirement that the government bear the burden of initiating judicial review of any adverse administrative action on a license for expression is an important one, *see Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988), because it ensures that one wishing to speak or worship will not be discouraged by an improper administrative denial and simply take his or her expression or worship elsewhere or try another time. *Freedman* at 59. That possibility is particularly likely in the context of the gatherings which the Petitioners attend since not one but several occur throughout the country in a given year. App. 21a (referring to "regional" gatherings). Persons who would otherwise be willing to take an active role in supporting a particular gathering might well be tempted to forego a challenge to an adverse authorization decision and simply gather in another National Forest elsewhere in the country. If that happened, however, potential attendees who can travel only limited distances to these gatherings would be deprived of the ability to share in the religious communion

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[15] As noted at 6-7, *supra*, the regulations also provide for immediate judicial review of a revocation, 36 C.F.R. § 251.60(a)(1)(ii); App. 49a, and the Third Circuit construed them below to provide for immediate judicial review of conditions which issuing officials may place upon a written authorization, App. 18a.

and the exchange of ideas which a nearby regional gathering would offer them.

Although there are circumstances under which the First Amendment does not require the licensor to bear the burden of initiating court action, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990), this is not one of them. *See supra* at 17-21. As noted, the gatherings at issue here occur several times and in several National Forests each year, App. 21a, so each such gathering is more akin to an individual motion picture, *Freedman* at 58-59, than to an entire business, *FW/PBS* at 229. The fact that the challenged regulations do not contemplate that Forest Service officials will consider the content of the proposed expression in evaluating an application may well affect *Freedman's* requirement that the government bear the burden of justification once in court, but the frequency of the gatherings, and the attendant danger that one might be abandoned in the face of an adverse administrative ruling requires that the government, not a disappointed applicant, bear the burden of bringing the matter before a court, just as in *Freedman*.

Finally, the challenged regulations are also deficient because they say nothing about the judicial review process itself. As noted at 13-14, *supra*, this Court has expressly required a prompt judicial decision when the applicable rules authorize the advance restraint of expression. *Freedman* at 59; *see also Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)(invalidating prior restraint on expression in advance of final determination concerning obscenity). This failure leaves a disappointed applicant to the vicissitudes of the litigation process. For instance, the Forest Service might easily delay any answer to an applicant's complaint until the time for the planned event has passed and then move to dismiss the action as moot. In addition, the licensing officials could use the fact that they

will likely be in possession of the written materials relevant to judicial review to delay or render ineffectual emergency proceedings even assuming that a disappointed applicant would be sophisticated and motivated enough to seek a temporary restraining order or a preliminary injunction once a complaint has been filed. The failure of these regulations to require prompt action by Forest Service officials in furnishing a reviewing court with the administrative record, and the failure to provide that an administrative application denial will have no effect until approved by a judge provides yet another reason why the challenged regulations are unconstitutional and why the Petitioners' conviction for violating them cannot stand.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that this Court issue a writ of certiorari directed to the United States Court of Appeals for the Third Circuit to review the opinion and judgment of that court affirming the Petitioners' convictions for gathering on National Forest land to speak and pray without prior special use authorization to do so.

Respectfully submitted,

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APPENDIX A

Filed December 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1733, 00-1734 and 00-1746

UNITED STATES OF AMERICA

v.

JOAN H. KALB
Appellant in No. 00-1733
(D.C.Crim. No. 99-cr-00074E)

UNITED STATES OF AMERICA

v.

GARRICK M. BECK
Appellant in No. 00-1734
(D.C.Crim. No. 99-cr-00075E)

UNITED STATES OF AMERICA

v.

STEPHEN M. SEDLACKO
Appellant in No. 00-1746
(D.C.Crim. No. 99-cr-00076E)

Appeal from the United States District Court
for the Western District of Pennsylvania

District Judge: Honorable Maurice B. Cohill, Jr.

Argued October 26, 2000

Before MANSMANN, ALITO and FUENTES,
Circuit Judges.

(Filed December 12, 2000)

OPINION OF THE COURT

MANSMANN, Circuit Judge.

These appeals comprise the latest installment in a series of legal skirmishes waged between the group known as "The Rainbow Family" or "The Rainbow Family of Light" and the United States Forest Service. Garrick Beck, Joan Kalb, and Stephen Sedlacko, participants in a 1999 Rainbow Family gathering, appeal from Judgments in Criminal Cases entered following the conviction of each of a misdemeanor violation of 36 C.F.R. S 261.10(k): "Use or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." These appellants challenge the Forest Service regulations, arguing that the relevant regulations do not apply to them as individuals and, in the alternative, that the regulations are constitutionally infirm both facially and as applied. Because we are convinced that the challenged regulations were properly applied to the individual appellants and do not transgress constitutional requirements, we will affirm the Judgments in a Criminal Case entered by the District Court.

I.

The facts underlying this appeal are set forth in detail in the opinion of the District Court, *United States v. Kalb*, 86 F. Supp. 2d 509 (W.D.Pa.2000). Accordingly, our recounting of the facts is brief. For a period of weeks during the summer of 1999, some 20,000 people attended a Rainbow Family[1] gathering in Pennsylvania's Allegheny National Forest. Each of the appellants was present at that gathering and was identified by a Forest Service criminal investigator as having had some role in organizing or administering the event.

In early July 1999, these three individuals were issued citations charging each with use of Forest Service land without special use authorization in violation of 36 C.F.R. § 261.10(k).[2] Related regulations provide that such "special use authorization" must be obtained for "noncommercial group uses." *Id.* § 251.50. "Special uses" include all uses other than timber harvesting, grazing and mineral extraction. *Id.* "Group use" is defined as "an activity conducted on National Forest System lands that involves a group of 75

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[1] The Rainbow Family has been described in other litigation as:

> . . . an unincorporated, loosely structured group of individuals that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and [to] exchange, develop, express and demonstrate their ideas and views. Annual gatherings have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country.

Black v. Arthur, 18 F. Supp. 2d 1127, 1130 (D.Or.1998), *aff'd*, 201 F.3d 1120 (9th Cir. 2000)(internal citations omitted).

[2] A number of Forest Service regulations were recodified in 1999. These changes altered the numbering of relevant sections. Because the District Court and the parties have consistently referred to these regulations by their original numbers, we do the same.

or more people, either as participants or spectators." *Id.* § 251.51.

The application for a permit is a simple one-page document which essentially requires the applicant to supply information concerning the location and description of the National Forest System land upon which the activity will take place, the facilities that the applicant seeks to use, the estimated number of participants and spectators, the starting and ending times and dates for the proposed activity, and the name of an adult who will sign a special use authorization on behalf of the applicant. *Id.* § 251.54.

Each of the appellants was advised by a Forest Service representative of the need for the Rainbow Family to apply for a special use permit and was asked to sign the permit application. Each refused.

In August 1999, the appellants were charged with violating the Forest Service regulations and, after a two-day bench trial in October 1999, each was found guilty. On June 1, 2000, each of the appellants was sentenced to a three-month term of imprisonment and was directed to pay a special assessment. A $500 fine was assessed against two of the appellants.[3] These sentences were stayed pending the filing and resolution of any appeal. These timely appeals followed and were consolidated for disposition.

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[3] The penalty provision of the regulatory scheme, 36 C.F.R. § 261.1b provides that:

> Any violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both pursuant to title 16 U.S.C. section 551, unless otherwise provided.

II.

The appellants raise a number of challenges to the Judgments entered against them. We consider these challenges seriatim, mindful that because of the "many legal contests between the Rainbow Family and the Forest Service," we do not write on a blank slate. *Kalb*, 86 F. Supp. 2d at 517.

We address first the contention that the regulations underlying the appellants' convictions criminalize only group rather than individual conduct: "This statute has no actus reus element that can be committed by an individual."

We reject this position because it is unnecessary that the statute specifically set forth the individual as the actor as opposed to the group; the statute need not begin "No person shall . . ." (as appellants argue) for individual liability to attach to a violation. The liability of an individual – or a group – occurs when the four requirements of the statute are proven.

Not one court considering the application of 36 C.F.R. § 261.10(b) has hesitated to apply that section to individual defendants. We are not persuaded to chart a different course here. In rejecting the appellants' argument, we are guided by the opinion in *United States v. Johnson*, 159 F.3d 892 (4th Cir.1998). There, the court clarified that proof of a violation of section 261.10(k)

> requires the government to demonstrate: 1) use, 2) of National Forest land, 3) by a noncommerical group of 75 or more persons, either as participants or spectators, 4) without special use authorization.

Id. at 894. The record demonstrates that these requirements were satisfied with respect to each of the appellants. Each knew of the permit requirement, that the gathering of which they were a part was large enough to implicate that requirement,[4] and that an application for a permit had not been made. Armed with that knowledge, these individuals could have avoided liability under the regulations by opting not to participate in the gathering on National Forest land where it was clear that a special use authorization was required and had not been granted. The record is devoid of any indication that it was "imperative for [the] Rainbow Family to gather in a national forest, as opposed to some other location, to pray and to discuss their views." *United States v. Linick*, 195 F.3d 538, 543 (9th Cir. 1999).

To read the regulation and the penalty for its violation as inapplicable to individuals who use the National Forest System as part of a group, with deliberate disregard for the group permit requirement, would effectively eviscerate the special use authorization process. We decline to do so.

III.

The appellants next attack particular aspects of the regulations on constitutional grounds, arguing first that the regulations are impermissibly vague and overbroad because they fail to establish standards for the public and for those enforcing the regulations "sufficient to guard against the arbitrary deprivation of liberty interests." *City*

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[4] The appellants do not contend that they were not part of the "group" that used the forest. Thus, this is not a case in which an individual is charged under the regulation simply because he or she happened to be in the same location with 75 or more persons who belonged to a "group" of which the individual is not a part.

of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . .." *Id.* at 56, 119 S.Ct. 1849 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)). The regulations here do not foster uncertainty. Unlike the ordinance at issue in *Morales*, the regulations clearly define what conduct is prohibited; there is no need for speculation.[5] Accordingly, we reject appellants' allegation that the regulatory scheme is unconstitutionally vague.

IV.

The appellants next contend that the regulation requirement that a special use authorization permit be signed by a member of the group burdens the .First Amendment rights of individuals attending a Rainbow Family gathering. According to the appellants, "[t]he challenged regulation is unconstitutional because it is not narrowly tailored to serve a significant governmental purpose nor does it

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[5] The Supreme Court in *Morales* considered the constitutionality of Chicago's Gang Congregation Ordinance. This ordinance prohibited "'criminal street gang members' from 'loitering' with one another or with other persons in any public place." 527 56, 119 S.Ct. 1849. "Loitering" was defined as "remain[ing] in any one place with no apparent purpose." *Id.* at 47, 119 S.Ct. 1849. The ordinance was void for vagueness where "[i]t [was] difficult to imagine how any citizen of the City of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id.* at 56-57, 119 S.Ct. 1849. "[T]he vagueness that doom[ed] this ordinance [was] not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering [was] covered by the ordinance and what [was] not." *Id.* at 57, 119 S.Ct. 1849. The regulations challenged here are not subject to the same uncertainty; the prohibition is clearly delineated.

leave open ample alternate channels of communication." By now there is a body of case law addressing the constitutionality of the signature requirement; this requirement has been upheld uniformly and we will uphold it here.

Even where expressive conduct takes place in a public forum, the government may impose reasonable "time, place and manner" restrictions on that conduct. *United States v. Johnson*, 159 F.3d at 895 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). These restrictions comport with constitutional requirements if they (1) are content neutral; (2) are "narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. The appellants do not dispute that the signature requirement is content neutral. They argue instead that the requirement is not narrowly tailored and that it forecloses alternative channels of communication.

These appellants represent that they and other participants in the Rainbow gatherings meet as "individuals who admit of no structure for leadership or hierarchy of decision-making." They then contend that the "refusal of the Government, through the guise of this permit scheme, to permit large groups of individuals to gather on Forest Service land, without first organizing and thereafter delegating authority, is unduly burdensome." According to appellants, any government interest served by the permit process "can all be fully served by a system which assesses proposed land uses on a case-by-case basis but does not require an agent for the group to sign a special use authorization." In essence, the appellants would have us hold that in order to satisfy the requirement that a restriction on activity protected by the First Amendment be narrowly

tailored, the government is required to omit the signature requirement from the permit scheme. We disagree.

The Supreme Court makes clear in *Ward* that in order to pass constitutional muster, a time, place and manner restriction need not be the "least restrictive means" of vindicating the government's interest. *See* 491 U.S. at 789-97, 109 S.Ct. 2746. Instead it is only necessary that the government "could reasonably have determined that its interests overall would be served less effectively without [the regulation] than with it." *Id.* at 801, 109 S.Ct. 2746. That certainly is the case here.

The interests vindicated by the regulatory scheme in general were detailed by the Court of Appeals for the Fourth Circuit in Johnson:

> The regulations, as well as the Department of Agriculture's comments accompanying them make clear that the regulations serve three purposes. They are designed to (1) "protect resources and improvements on National Forest System lands," (2) "allocate space among potential or existing uses and activities," and (3) "address concerns of public health and safety."

159 F.3d at 895 (quoting 60 Fed. Reg. 45,258, 45,262 (1995)). The Court then concluded that:

> The permit requirement serves these three goals in a narrowly tailored manner by providing a minimally intrusive system to notify Forest Service personnel of any large groups that will be using the forest so that the personnel, through advance preparation, can minimize any damage that may occur.

Id.

That the interests served by the signature requirement in particular would be served less effectively were that requirement eliminated has also been recognized. We agree with the reasoning of the District Court in *United States v. Masel* F. Supp. 2d 903, 919 (W.D.Wis.1999):

> With respect to the signature requirement, requiring an individual to sign a special use authorization as a representative of the group is necessary to ensure that the group will be responsible for the actions of its members as a whole, to give the authorization legal effect and to subject the group to the authorization's terms and conditions. Without the ability to impose terms and conditions on all members of a group, the government would clearly be extremely hampered in its ability to achieve any of its interests. The terms and conditions of a group use permit would have little teeth if they only applied to the individual who signed the permit.

Based on these analyses of the interests served by the regulatory scheme generally and the signature requirement in particular, we are convinced that the regulations are sufficiently "narrowly tailored" to serve legitimate government interests.

We are similarly convinced that imposition of the signature requirement "leave[s] open ample alternative channels for communication." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. The regulation does not preclude the use of state or private property for Rainbow Family gatherings. It also does not impinge upon the right of the Rainbow Family to meet on federal land which does not fall within Forest Service jurisdiction or to gather in groups made up of fewer than 75 individuals. Again, we agree with the District Court's conclusion in *United States v. Masel:*

> The Rainbow Family has a choice; if it does not wish to perform an act that is antithetical to its core belief [-- designating a representative to sign a permit application –] it can hold its gatherings in an area that does not have a permit requirement.

54 F. Supp. 2d at 918.

Because we find that the challenged signature requirement represents a reasonable time, place and manner restriction on expressive conduct, we reject the appellants' argument that the requirement transgresses the guarantees of the First Amendment.[6]

V.

We turn next to the appellants' challenge to that portion of the regulatory scheme authorizing the Forest Service to attach terms and conditions to the grant of a permit. The appellants contend that 36 C.F.R. § 251.56 is unconstitutionally overbroad in that it confers "unbridled discretion" upon representatives of the Forest Service.[7] The appellants

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[6] We reject, too, the appellants' claim that it was "legally impossible" for them to sign a special use authorization. The appellants maintain that because they are merely associated with the Rainbow Family on a loose voluntary basis and lack authority to act on behalf of the group, they cannot sign a special use permit. This argument has been raised many times but has never been credited. To recognize the appellant's claim of legal impossibility would permit groups, however loosely-organized, to "maintain a fiction that they have no leaders or agents" and thereby to undercut the special use authorization process. *United States v. Masel*, 54 F. Supp. 2d at 920. "[B]ecause the attendees at the gathering could have designated [appellants] as [persons] who would sign the permit on behalf of the group without breaking any laws, it was not legally 'impossible' for [them] to sign the permit." *Id.*

[7] This provision reads:

(a) General. Each special use authorization must contain:

challenge the facial validity of these regulations; because the appellants did not apply for and did not receive a special use permit, the regulatory provisions at issue were never applied to them.

In evaluating this argument we are guided by the Supreme Court's admonition that "the doctrine of overbreadth is appropriately applied in a facial challenge only where 'the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.'" *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir.1992) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). "Accordingly, 'there must be a realistic danger that the [regulation] itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). "[A] litigant must establish something more than a mere possibility that a particular grant of discretion might be used unconstitutionally in some other setting." *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 66 (3d Cir.1990).

(ii) Such terms and conditions as the authorized officer deems necessary to (A) Protect Federal property and economic interests; (B) Manage efficiently the lands subject to the use or adjacent thereto; (C) Protect other lawful users of the land adjacent to or occupied by such use; (D) Protect lives and property; (E) Protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and (G) Otherwise protect the public interest.

As we have noted, the numbering of this section was amended in 1999.

In *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 751, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), the Supreme Court set forth a two-part test governing when a First Amendment facial challenge may be made to an allegedly overbroad licensing scheme. First, the regulation must confer upon a governmental official or agency "substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." 486 U.S. at 759, 108 S.Ct. 2138. Second, "[t]he law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.*[8]

The appellants contend that the terms and conditions portion of the special use regulatory scheme, 36 C.F.R. § 251.56, is subject to facial challenge under the test announced in *Lakewood* because the broad discretion granted to the Forest Service could, at some future point, be used to chill protected speech by groups with disfavored political or social views. The appellants focus particularly on language in the regulation which permits the Forest Service to impose upon a special use permit terms and conditions deemed necessary "to protect the public interest." We have reviewed the terms and conditions provision against the background of the case law and are

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[8] The Supreme Court has left open the issue of whether an individual should be allowed to mount a facial challenge on the basis of unguided discretion in regulating the *manner* of speech, instead of excessive discretion in regulating whether speech should be prohibited altogether. *See Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)("Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.").

convinced that this provision does not satisfy the facial challenge requirements set forth in *Lakewood.*

We consider first the relationship between the terms and conditions provision and expressive conduct, and conclude that any relationship is, at best, incidental. Section 251.56 "does not target First Amendment activities." *Masel,* 54 F. Supp. 2d at 912. It is "not directed narrowly and specifically at expression or conduct commonly associated with expression." *Id.*

The terms and conditions provision does not permit the Forest Service to ban disfavored speech. Moreover, it is applicable to every special use authorization; the clause does not single out a "particular group, activity, or conduct but is directed at all uses of the National Forest." *Id.* at 912-13. Groups seeking to use the national forests for traditionally expressive purposes such as assemblies, meetings, demonstrations and parades need not obtain special use authorization and are not subject to the terms and conditions provision unless their numbers reach or exceed 75. The special use authorization scheme in general and the terms and conditions provision in particular are "directed not at expression, but at the congregation of large numbers of people in the forest." *Id.* at 913. When the provision is triggered, it applies with equal force to recreational, expressive and all other special uses of the forest. "Thus, the regulation is closer to a law of general application." *Id.* at 914. "In this case, the 'terms and conditions' provision 'provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.'" *Id.* at 913 (quoting *Lakewood,* 486 U.S. at 761, 108 S.Ct. 2138).

Although we acknowledge that there is some theoretical possibility that the "terms and conditions" provision could

be invoked to chill protected speech, we are not persuaded that "[t]he risk that Forest Service officials will use nefariously any discretion afforded to them by the . . . provision is . . . great enough to justify invoking the 'extraordinary doctrine' that permits facial challenges." *Id.* at 914 (quoting *Ward,* 491 U.S. at 794, 109 S.Ct. 2746).

Our position with respect to the first prong of the *Lakewood* test is similar to that adopted by the District Court in *Masel:*

> [S]pecial uses cover virtually the entire spectrum of outdoor activities, the majority of which have nothing to do with protected expression. In the absence of empirical evidence demonstrating that a significant proportion of the special use authorizations granted by the Forest Service each year are for speech-related activities, there is no basis to conclude that the terms and conditions provision presents a substantial opportunity for censorship on an ongoing basis.

54 F. Supp. 2d at 913-14. We thus hold that appellants may not make a facial challenge to the regulation.

In the interest of completeness, we note that even were we to entertain such a challenge, we would reject it on the merits because the regulation, as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression. *See* 60 Fed. Reg. at 45,262 (1995). "In evaluating the constitutionality of a regulatory scheme, we should 'presume any narrowing construction . . .' to which the law is 'fairly susceptible.'" 195 F.3d 538, 542 (quoting *Lakewood,* 486 U.S. at 770 n. 11, 108 S.Ct. 2138).

As we have noted, the argument that the terms and conditions provisions of the regulation is purposely vague, giving the Forest Service the ability to invoke health and safety concerns as a pretext for censoring expressive activity, is not a novel one. Since 1995, the Forest Service has consistently taken the position that discretion granted to it under the regulations may only be used to further the government's threefold interest in regulating non-commercial group use of forest land: (1) "protect[ing] resources and improvements on National Forest System lands;" (2) "allocat[ing] space among potential or existing uses or activities;" and (3) "addressing concerns of public health and safety." 60 Fed. Reg. at 45,262 (1995). We agree with the District Court writing in *United States v. McFadden*, 71 F. Supp. 2d 962 (W.D. Mo. 1999), that the regulation authorizing the Forest Service to impose terms and conditions "necessary to protect the public interest"

> passes constitutional muster, particularly because the Forest Service has specifically identified the "public interests" it seeks to protect . . .. [T]erms and conditions may only be imposed to protect one of the delineated interests. Specifically, "terms and conditions that the Forest Service may impose in a permit are limited to those designed to assure compliance with otherwise applicable health and safety standards; to minimize damage to water quality, fish, wildlife, and other environmental aspects of the forests; and to protect the physical safety of all those in the National Forest System."

Id. at 965.[9] We agree, too with the District Court's finding that:

> Regardless of . . . efforts to describe the terms and conditions provision attached to a special use permit as potentially onerous and oppressive . . . the regulations . . . limit the permitting official's discretion in an objective, constitutionally sound manner.

Id.

Accordingly, we hold that the appellants' facial challenge fails.

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[9] In 1999, the Forest Service promulgated an interpretive rule clarifying the scope of 36 C.F.R. § 251.56. *See* 64 Fed. Reg. 48,959 (1999). This interpretive rule, which essentially embraced the holding in *United States v. McFadden*, 71 F.Supp.2d at 962, reads in relevant part:

> The imposition of terms and conditions in noncommercial group use permits is limited to those designed to further the three public interests identified by the Forest Service in promulgating the noncommercial group rule . . ..

We are aware that the Court of Appeals for the Ninth Circuit held in *United States v. Linick* that, prior to issuance of this interpretive rule, the terms and conditions portion of the special use authorization scheme could have been invoked to attach conditions to the use of a public forum in advance of actual expression and was, as a result, "facially invalid." 195 F.3d at 542. The court concluded that the interpretive rule preserved the constitutionality of the scheme because the scheme, as limited by the rule, satisfied the criteria applicable to a permissible "time-place-manner regulation" of expressive activity. *Id.* at 543.

The court, however, dismissed the information filed against Linick and other defendants alleging a violation of 36 C.F.R. § 261.10(k), reasoning that, because the conduct alleged took place in 1998 and the interpretive rule was not promulgated until September 1999, "[t]he regulation . . . gave the Defendants inadequate notice about the danger of being successfully prosecuted under this newly and narrowly construed regulatory scheme." *Id.* at 544.

As we have explained, we do not agree with the Court in *Linick* that the terms and conditions portion of the regulatory scheme is constitutionally infirm under the criteria set forth in *Lakewood.*

VI.

In a related argument, the appellants contend that the special use authorization scheme is subject to a facial challenge and is unconstitutional because it impinges upon First Amendment rights by not providing for immediate judicial review of overly restrictive search-related terms and conditions which theoretically could be attached to the grant of a permit. The government disagrees, arguing that, under the regulations, immediate judicial review is available to challenge the imposition of terms and conditions: "The Forest Service does not believe that it can require exhaustion [of administrative remedies] in the noncommercial group context."

The government's interpretation of its own regulations is entitled to controlling weight, and this particular interpretation has been adopted by at least one court. *See, e.g., United States v. McFadden*, 71 F. Supp. 2d 962, 966 (W.D.Mo.1999)(upholding government reading of regulations to permit applicants [f]or special use permit to go "directly to court" to challenge terms and conditions attached to permit.) Appellants do not cite caselaw to the contrary.

We are convinced that the government's construction of the relevant regulations is reasonable and that the judicial review provisions of the regulatory [*sic*] are not constitutionally infirm.

VII.

Because we are convinced that the special use authorization scheme was properly applied to these individuals and is constitutional both on its face and as it was applied here, we will affirm each of the Judgments in this Criminal Case.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

United States of America,

v.

Joan H. Kalb, Garrick M. Beck,
and Stephen M. Sedlacko.

Nos. 99-74 ME, 99-75 ME, 99-76 ME.

March 16, 2000.

OPINION

COHILL, Senior District Judge.

Introduction

The three defendants above-named were each charged by Information with a misdemeanor for violation of 36 C.F.R. § 261.10(k): "Use or occupancy of National Forest lands without authorization when such authorization is required."[1]

The regulations considered here govern the noncommercial assembly of 75 or more persons in a national forest. The defendants argue that the regulations are either unconstitutional or simply don't apply to them as individuals.

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[1] For ease in reference the applicable sections of the Code of Federal Regulations ("C.F.R.") have been reproduced in Appendix A, attached to this opinion.

We conducted a two day bench trial, and directed the parties to file proposed Findings of Fact and Conclusions of Law. In accordance with Fed. R. Crim. P. 23(c) we make the general finding that each defendant is guilty as charged and will dismiss their motions for Judgment of Acquittal. In addition, we make the following Findings of Fact and Conclusions of Law.

Findings of Fact

For many years there have been legal skirmishes between a group known as "the Rainbow Family" and the United States Forest Service. *See, e.g., United States v. The Rainbow Family,* 695 F. Supp. 294 (E.D. Tex. 1988). The Rainbow Family, or "Rainbow Family of Living Light," as it is sometimes called is, as one court stated:

> "... an unincorporated, loosely-structured group that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and [to] exchange, develop, express, and demonstrate their ideas and views. Annual gatherings have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country."

Black v. Arthur, 18 F. Supp. 2d 1127, 1130 (D. Or. 1998), *aff'd,* 201 F.3d 1120 (9th Cir. 2000).

The violation of 36 C.F.R. § 261.10(k) is the same charge which many defendants have faced in reported cases as a result of Rainbow Family gatherings. Participants in these gatherings consistently refuse to sign the permit application as required by 36 C.F.R. § 251.50.

The instant citations were issued to defendants Sedlacko and Beck on July 2, and to Kalb on July 5, 1999, in the Bear Creek area of the Allegheny National Forest, Pennsylvania, during a "gathering" of the Rainbow Family.

In late June and early July, 1999, some 20,000 people gathered in the Allegheny National Forest to participate in, or observe, the Rainbow Family gathering.

The Code of Federal Regulations requires noncommercial groups of 75 or more to apply for a permit (often called a "special group use" permit) to gather in a national forest. 36 C.F.R. § 251.50(a). The application is a simple one page document, which each of the three defendants refused to sign. Gov. Ex. 6, 36 C.F.R. § 251.54.

The thrust of their defense is that no one was designated by the Rainbow Family to sign the application because the Rainbow Family is not an entity of any sort, and therefore no one can act on its behalf. Without some sort of designation or authority emanating from the Rainbow Family, so the argument goes, none of these three defendants can be responsible for the failure to obtain a permit.

The Court of Appeals for the Third Circuit has not directly addressed this question. However, this argument was recently rejected by the United States Court of Appeals for the Ninth Circuit. *Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000).

The Government argues that because 36 C.F.R. § 251.51 defines "group use" as "an activity conducted on National Forest System lands that involves a group of 75 or more people, either as *participants or spectators*," (emphasis supplied) these three defendants could be cited, since, in the opinion of the Forest Service officers who had contact

with them, they not only were participants, but appeared to have leadership roles at the gathering.

William C. Fox, of Missoula, Montana, a criminal investigator for the U.S. Forest Service, was present at the Allegheny National Forest as the "incident commander" for a national team that is responsible for managing large group events in national forests. (T. 7).

He testified that when he was present at a Rainbow Family gathering in Arizona in the summer of 1998, he was informed by defendant Garrick M. Beck that the Rainbow Family would have a national gathering in the Allegheny National Forest in 1999. (T. 8). He had first met Mr. Beck in March, 1998 in Santa Fe, New Mexico. Mr. Fox said that he also saw an announcement of the 1999 gathering on the Rainbow web site on the Internet. (T. 10). Mr. Fox was quite familiar with these events, having first attended a Rainbow Family gathering in 1992 in Colorado. (T. 10). He knew that there were occasional regional Rainbow gatherings as well as national ones (T. 12), and in conversations with Beck he learned something of the internal organization of the Rainbow Family; it was then that Beck suggested that Fox work with a group he called the "peace keepers", or "Shanti-Sena" of the Rainbow Family, in anticipation of the Allegheny Forest Gathering. An exhibit entitled "Rainbow Guide" (Gov. Ex. 3) describes the so-called councils thus:

> **COUNCILS**
>
> We gather in council circles to voice and creatively resolve the issues and concerns of our ever evolving Gathering. Participation in a council requires a focused mind, a listening ear and an open heart as we make critical decisions on how to best serve the

Gathering. The power to listen is sacred to the process.

Councils occur regularly on all workings of the gathering. They include: Main Council, Coop Council, Vision, Clean-up, Legal team, Shanti Sena, CALM, Info, Rainbow Guide, All Ways Free, Focalizers, Kitchens, firewatch, Bus Village and any other special event, issue or aspect.

Councils are excellent opportunities to help create the Gathering.

In addition to this description of the Councils, there is also a description of the "Main Council" at page 8 of the Rainbow Guide:

MAIN COUNCIL

Main Council is held at rainbow noon in Main Meadow to deal with the business of the Gathering and provide an open forum for anyone and announced by 3 repeated blowings of the conch shell. It is the only time decisions affecting the Gathering can be made.

With the evolution of diverse councils caring for the many needs of the village the question is asked. "Where is Main Council now?"

There was a time when it lasted for days without end. We shared openly what we were learning during the eco-psychedelic revolution. We expressed fears or anger and went away clearer. We addressed all issues, focused our heart songs, and healed our relations. We gave room for all people to share our experience and we were healed. With enthusiasm we

unlocked the mysteries of why we were together as a Rainbow People. Maybe the time to sit together in this way has come again?

At Main Council in New Mexico it was consensed (sic) that the Annual Gathering and the council should begin on June 21 and end on July 10 allow more time to synthesize our community and The Rainbow Family Tribal Council. Seven days goes by quickly. A longer Main Council would lead to a clearer vision of the tribal village. A strong tribal coalition can transform unconsciousness and archaic forms of decision-making into creative enlightened potentials.

This controversial decision begged us to look at the purpose and form of Main Council.

Now with twenty days of council, what can we do? Its up to you. Participate and help redefine Main Council.

Mr. Fox also identified a Rainbow Family manual on how to put on a gathering. (Gov. Ex. 1). He had also printed his own copy of the manual from the Rainbow web site. This exhibit defines Shanti-Sena (the group Mr. Beck suggested Mr. Fox work with) as follows:

Shanti-Sena

Shanti-Sena means "Peace Center"! There are no "Rainbow Police." We are secure because we watch out for each other. We are All Shanti-Sena. Experienced Shanti-Sena hold regular peace keeping workshops which everyone is encouraged to attend at least once. Do you know what to do in an emergency?

The Rainbow Family appears to base much of its organization and activities on the ways of the American Indians, or Native Americans as they are sometimes called. The manual states in part: "*There is no authoritarian hierarchy here.* We have a tribal anarchy where we take care of each other, because we recognize that we are all *One*." (Gov. Ex. 1). It also states:

Gathering on Public Lands

> Our Permit to Gather reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peaceable (sic) to assemble and to petition the government for redress of grievances."

Gov. Ex. 2 is an announcement of the Allegheny Forest gathering, titled "Rainbow Gathering of the Tribes for World Peace & Healing. June 28-July 10, 1999, Allegheny National Forest, Pennsylvania." It contains directions to the Allegheny National Forest and, among other things, suggestions as to what participants should bring to the gathering.

On the last page this underlined statement appears: "*Please do not sign any permits for 'Rainbow Family Gathering.'*"

The announcement continues:

> "'Congress shall make no law respecting . . . religion, speech, press; or the right of the people peaceably to assemble.' Do administrated (sic) agencies now have powers that the Constitution specifically withheld from Congress? Applying for 'permits' gives authority to 'authorities' to participate in the 'control' of people

assembling and 'permit' a strong 'police presence' and the further ends of the 'control' agenda are met!"

In addition, Mr. Fox identified a "Rainbow Guide." (Gov. Ex. 3). On the front page is a picture of a man and woman sitting in front of a teepee. The Guide contains more details on gatherings, definitions, words and phrases used by the Rainbow Family, and the names and addresses of "Focalizers," people "who let you know what's happening where and when, and who you want to contact when you have info to share. Please remember these people are cool and can use much help in the efforts of focalizing."

Many of the names of people listed as focalizers are simply a first name, such as "Mark" or "Paul" with an address. Others sound like Indian names: "Flickerfeather," ["]Squirrley Possum," "Sun Beat," etc.

At the end of the Guide (page 37) is a form where a person may state his/her name, address, and list, among other things, community, trades, crafts, skills, and projects, and "needs." It states "Contribution $_____. A $4.00 donation will help create a quality guide." The form is to be sent to:

The Rainbow Guide
P.O. Box 1016
Hackensack, N.J. 07602-1016

Mr. Fox testified that he had met "focalizers" both in 1998 and 1999. They let the Forest Service know "where the kitchens were going to be located, where certain individuals were located if we needed to contact somebody. There were times when people stepped forward saying, you know, we're not going to sign, you know, a permit. We're not going to submit an application." (T. 22).

"The focalizer tended to do all of the speaking and the other folks just would sit there and listen. Generally it was the focalizer that I would have the conversation with." (T. 22).

Mr. Fox identified the defendant. Joan H. Kalb, as the focalizer listed in the Guide as "Joanee Freedom." (T. 23). Mr. Fox stated that defendant Garrick M. Beck never identified himself as a focalizer, ". . . but clearly, during the couple of years that, you know, year and a half, that I've known Garrick, he is an individual who is very articulate and very involved with the gatherings. Attended a number of the gatherings himself, and clearly he was an individual, in my opinion, that knows what's going on at these gatherings." (T. 23, 24).

Mr. Fox testified, and we find, that by mid June there were over 75 people at the gathering, and by July 2 to July 5 there were approximately 20,000 people present. (T. 27).

Mr. Fox, in 1998, had told Mr. Beck that the Forest Service was going to require a permit for the 1999 gathering, and he stated that they had also discussed the subject several times in 1999. Each time Beck said they would not apply for a permit. (T. 29).

On or about June 17, 1999, there was a meeting in Ridgway, Pennsylvania, which was the town closest to the gathering. It was convened by the Pennsylvania State Police and some local citizens who were concerned about the impending gathering. About 300 local citizens attended. Mr. Beck attended the meeting and described "who the Rainbows were, and why they were there." (T. 34).

Robin L. Poague, a special agent with the Forest Service, from Glynoco, Georgia, testified that he first came in contact with the Rainbow Family in the spring of 1995

at a gathering in Arizona. (Vol. II, T. 14). On or about June 17, 1999, Mr. Poague spoke with Mr. Beck, who he had met at the 1995 Arizona gathering, Mr. Poague was accompanied by a local Forest Ranger, John R. Schultz. Mr. Schultz had a package containing an application for a group use permit, a copy of the applicable Code of Federal Regulations and a letter addressed to "Rainbow Family Gathering" from John E. Palmer, Forest Supervisor. (Gov. Ex. 6, hereinafter referred to as the "Permit Package"). The letter set forth the need and method to apply for a permit. (Vol. II, T. 19). Ranger Schultz handed the package to Mr. Beck.

Mr. Beck told Mr. Poague and Mr. Schultz that he wanted to take the issue of the permit to the Council.

In early July (probably July 2, 1999) Mr. Poague encountered the defendant Stephen Sedlacko for the first time. (Vol. II, T. 23). Officer Poague was looking for Beck to find out the decision about the permit, and Sedlacko agreed to arrange a meeting with Beck. Later in the afternoon (July 2, 1999) he met with Sedlacko and Beck (Vol. II, T. 26).

Poague told Beck that he was going to cite him for failure to obtain a permit; Beck said he would accept a citation, but didn't want to be cited alone, whereupon Sedlacko volunteered to be cited also. (Vol. II, T. 27). Mr. Poague also knew Mr. Sedlacko by the name "Steven Principle." (Vol. II, T. 27).

Beck proposed that volunteers be provided by the Rainbow Family to accept the citations, which offer Poague refused. Forest Service Officer Steven S. Burd, who was also present, then issued citations to Messrs. Beck and Sedlacko. (Gov. Ex. 10 and 11) (Vol. II, T. 129).

Mr. Sedlacko had written a column in a Rainbow tabloid (Gov. Ex. 7) under the name "Stephen Principle" with the headline: "'Permit'-tion and our right to gather." On the opposite page was a column entitled "Legally Speaking" which purported to report a conversation between Stephen Principle and one Scottie Addison, discussing "unfavorable" court rulings on the permit issue.

Ranger John R. Schultz testified regarding defendant Joan Kalb, who had first been identified to him as "Joanie Freedom." Mr. Schultz is stationed at the Allegheny National Forest, but had attended other Rainbow gatherings. (Vol. II, T. 79).

The circumstances of the initial meeting with Ms. Kalb were these: On May 29, 1999, Ranger Schultz and one of his staff, Arnie Irvine, went out to the location of the gathering. They had heard that the Rainbow Family was having a spring council meeting, and they wanted to locate where it might be. They came upon a group of forty to fifty people who were talking. (Vol. II, T. 79). Ms. Kalb "pinched off" the conversaion and invited the officers to speak to the group. Schultz discussed the need for a permit with Ms. Kalb and the group for about an hour and a half. (Vol. II, T. 81). He attempted to present the Permit Package, but no one would accept it. (Vol. II, T. 83).

Officer Schultz met Ms. Kalb again on June 11, 1999, and attempted to present the Permit Package. Again, no one present would accept it, so he left it on the ground in front of the group. (Vol. II, T. 83).

On June 12, 1999, he again met with Ms. Kalb, "didn't make any progress on the permit issue itself," but then discussed in detail with her resource management plans as well as the operational aspects of the gathering. (Vol. II, T. 83, 84).

On July 5, 1999, at the direction of Officer Schultz, Officer Burd issued a citation to Ms. Kalb. (Vol. II, T. 132).

It is clear from the testimony of the government witnesses that there was never any animosity or acrimony between the Forest Service personnel and the defendants; indeed, they were on a first-name basis. The defendants simply refused to sign the permit application when requested to do so by the officers after lengthy conversations with them.

It is also clear from the trial testimony and the exhibits that there is quite a complete internal organization of the Rainbow Family in the form of the Councils and committees. The members simply attempt to avoid the permit application requirements by refusing to designate an applicant.

Conclusions of Law

The main thrust of the defendants' argument is that they cannot be cited as individuals since they have not been designated by the Rainbow Family to act on the group's behalf. According to the defendants' brief, page 13, the group "refused" to designate anyone to act, therefore these defendants are immune from prosecution. This argument was discussed and rejected by a court of appeals as recently as February 9, 2000. *Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000). *See also, United States v. Masel*, 54 F. Supp. 2d 903, 920 (W.D. Wis. 1999); *United States v. Rainbow* Family, 695 F.Supp. 294, 298 (E.D. Tex. 1988).

The defendants have not only fit the definition of "participants" in this gathering but also, as discussed in our Findings of Fact, had leadership roles as spokespersons for the Rainbow Family. They are certainly valid objects of prosecution.

The defendants further argue that the noncommercial group use regulation is unconstitutional in that it abridges their rights under the First Amendment. This proposition has also been rejected. "The exercise of civil liberties depends upon the existence of 'an organized society maintaining public order;' thus civil liberties must occasionally give way to laws 'designed to promote the public convenience in the interest of all.'" *Masel*, 54 F. Supp. 2d at 907 (quoting Cox v. *State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L. Ed. 1049 (1941)).

The Fourth Circuit Court of Appeals thoughtfully discussed this issue in *United States v. Johnson*, 159 F.3d 892 (4th Cir. 1998). The case arose, as so many other "Rainbow Family cases" have, this time, during a gathering in the Pisgah National Forest, North Carolina.

Four individuals were cited for their refusal to apply for a special use permit. One of their defenses was that the Forest Service permit requirement violated their First Amendment free speech and freedom of association rights. They argued that the regulations were unconstitutional because they burdened "substantially more expression than necessary to further the government's legitimate interests." 159 F.3d at 895 (quoting from appellants' brief). The law is clear that when "expressive conduct" occurs on public grounds, the government can impose reasonable "time, place and manner" restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L. Ed. 2d 661 (1989). Furthermore, such restrictions are constitutionally valid "as long as they are (1) content neutral, (2) 'narrowly tailored to serve a significant governmental interest,' and (3) 'leave open ample alternative channels for communication of the information.'" *United States v. Johnson*, 159 F.3d at 895, quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; *see also Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.Ct.

2395, 120 L. Ed. 2d 101 (1992). The court then went on to hold that the regulations clearly serve three purposes: to protect resources and improvements on National Forest System lands, allocate space among potential or existing uses and activities, and redress concerns of public health and safety. *Id.* at 895; 60 Fed. Reg. 45,258, 45,262 (1995).

The opinion then stated: "The permit serves these three purposes in a narrowly tailored manner by providing a minimally intrusive system to notify Forest Service personnel of any large groups that will be using the forest so that the personnel, through advance preparation, can minimize any damage that may occur." *Id.* at 896.

The national forest lands are a precious asset of this nation. While the members of the Rainbow Family may regard the environment as something to be guarded and treasured, and while they may be conscientious about protecting those lands when they are present on them, other groups may not be. It would be an impossible assignment for the Forest Service to predict that one group will not harm a national forest and that another group might. There must be some method in place to maintain "the public order;" it is not an abridgment of First Amendment freedoms if the law is narrowly tailored to serve a significant governmental interest. *Ward,* 491 U.S. at 791, 109 S.Ct. 2746; *Masel,* 54 F. Supp. 2d at 907. We thus reject the argument that the requirement of a permit is violative of the First Amendment.

Defendants also argue that the term "group use" as defined in 36 C.F.R. § 251.51 is "vague and overbroad." This is another argument advanced in many Rainbow Family cases; it likewise has been analyzed by the courts and then dismissed. *See Black,* 18 F. Supp. 2d at 1132 and cases cited therein. From the many examples in the Rainbow Family printed material, as quoted in our Findings of

Fact, it is clear that the Rainbow Family is a well organized group. We thus reject the argument that their use of national forest lands is not a "group use."

The defendants, in their supplementary brief, have raised a facial challenge to the regulations, citing *United States v. Linick,* 195 F.3d 538 (9th Cir.1999). In *Linick* a district court judge had considered a Rainbow Family facial challenge to 36 C.F.R. § 251.56(a)(2)(vii). This is the provision that states in pertinent part: "Each special use authorization shall contain:

***

(2) Such terms and conditions as the authorized officer deems necessary to . . . .
(vii) otherwise protect the public interest."

In that case two members of the Rainbow Family were charged in an information with use of the Apache-Sitgreaves National Forest, Arizona, in June, 1998, without a permit. The district court granted the defendants' motion to dismiss, ruling that the quoted section gave Forest Service officers "impermissibly broad discretion in violation of the First Amendment" and was therefore unconstitutional on its face. *Linick,* 195 F.3d at 541.

The Court of Appeals for the Ninth Circuit affirmed the dismissal of the citations, relying particularly on City *of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S.Ct. 2138, 100 L. Ed. 2d 771 (1988). In that case a city ordinance gave the mayor of Lakewood the authority to grant permits to place newsracks on public property. The ordinance allowed the mayor to attach to the permit any "terms and conditions deemed necessary and reasonable." *Id.* at 754, 108 S.Ct. 2138. The Supreme Court suggested that this resulted in the mayor having "impermissible

discretion to deny expressive activity." *See id.* at 769, 108 S.Ct. 2138.

The Ninth Circuit Court then took an unusual step. The gathering in question had occurred in June, 1998. In September, 1999 (perhaps in response to the holding of the district court in *Linick*), the Forest Service issued an interpretive rule relative to 36 C.F.R. § 251.56. *See* Fed. Reg. 48,959. The rule stated in relevant part:

> The imposition of terms and conditions in noncommercial group use permits is limited to those designed to further the three public interests identified by the Forest Service in promulgating the noncommercial group use rule, i.e., the need to address concerns of public health and safety, to minimize damage to National Forest System resources, and to allocate space among actual or potential uses and activities.

The court then went on to hold that the interpretive rule served to preserve "the constitutionality of the regulatory scheme because the scheme now satisfies the three-part test for time-place-manner regulation." *Linick*, 195 F.3d at 543.[2]

However, the interpretive rule came more than a year after the citations were given to the defendants. Thus, the court held that while the interpretive rule now preserved

---

[2] As previously noted, *infra* [sic], the government may regulate the time, place, and manner of expressive activity in a public forum, so long as the regulatory scheme is (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave[s] open "ample alternatives for communication." *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.Ct. 2395, 120 L. Ed. 2d 101 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L. Ed. 2d 661 (1989).

the constitutionality of the regulation, it was not retroactive in effect. The court then affirmed the district court on its dismissal of the information, but reversed the district court's ruling that the regulation itself was unconstitutional.

The chronology in the case at bar is similar to that in *Linick* – the September, 1999, interpretive rule came after the July, 1999 Rainbow gathering in the Allegheny National Forest. The defendants thus argue that we should follow *Linick* and dismiss the charges.

We respectfully decline to follow *Linick*. We believe the reliance of the Ninth Circuit court on *Lakewood* is misplaced. The Lakewood ordinance was aimed directly at the placement of newspaper stands, so of course, carried to its logical extreme, the mayor was given the unfettered power to prohibit or otherwise control where news could be dispensed, a direct assault on the First Amendment both in terms of freedom of the press and freedom of expression.[3]

We do not see how such infringement could carry over to the Forest Service permit considered here. The language *Linick* held to be objectionable was that which stated that the permit could contain "such terms and conditions as the authorized officer deems necessary to . . . (iii)[sic] otherwise protect the public interest."

The Ninth Circuit Court of Appeals speculated that "the Forest Service's broad discretion to attach terms and conditions to a permit can be abused in a manner that could limit the use of public lands by parties who hold political views that are disfavored by the Forest Service." *Linick*, 195 F.3d at 542. We feel that it is a stretch to say that

---

[3] Although we agree with the holding in *Lakewood*, it was a close 4-3 decision with two justices not participating.

Lakewood should be precedent for a holding that the language in question was facially unconstitutional. In any event, we need not reach the effect of the interpretive rule. Even without it, the regulation was clearly intended to regulate conduct relative to public health and safety, not speech or expression.

We therefore decline to follow the holding in *Linick*.

Conclusion

The defendants are guilty as charged. It would be impossible to estimate the judicial resources that have been expended through the years in the many legal contests between the Rainbow Family and the Forest Service. In this case alone, Forest Service personnel from Georgia and Montana had to be separated from their regular duties to come to Pennsylvania to testify, as did personnel assigned to duties in the Allegheny National Forest. Obviously, scarce resources of the Court, the Justice Department and the Forest Service have been expended to handle this case and the many others involving the Rainbow Family through the years, and always over the same issue – refusal to apply for a permit.

Perhaps the Ninth Circuit Court of Appeals considered the interpretive rule, when it was not even an issue in the *Linick* case, in the hope of heading off yet another Rainbow Family case which might challenge the efficacy of the new interpretive rule at sometime in the future.

It's not as if the issues considered here were "landmark" in nature; time and again the Rainbow Family has made the same arguments and had them rejected by courts all over the United States.

While the "mouse-that-roared" syndrome sometimes has the appeal of tweaking the authorities on the nose, we hope that the time to stop has finally arrived.

[District Court] Appendix A

For ease in reference, the applicable sections of the Code of Federal Regulations are set forth here.

36 CFR § 251.50 Scope

(a) . . . Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special authorization from the authorized officer . . .

36 CFR § 251.51 Definitions

"Applicant" – any individual, partnership, corporation, association . . . which applies for a special use authorization.

"Group Use" – an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

"Holder" – any applicant who has received a special use authorization.

"Noncommercial use or activity" – any use or activity that does not involve a commercial use or activity[.]

"Special use authorization" – a permit . . . which allows occupancy, use, rights or privileges of National Forest System land.

36 CFR § 251.54 Proposal and application requirements and procedures

* * *

(d) Proposal content-

(1) Proponent identification. Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to receive notice of actions pertaining to the proposal.

(2) Required information –
(i) Noncommercial group uses . . . A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;
(B) The location and a description of the lands and facilities the proponent would like to use;
(C) The estimated number of participants and spectators;
(D) The starting and ending time and date of the proposed activity; and
(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.

* * *

(g) Application processing response.

* * *

(3) Response to applications for noncommercial group uses.

* * *

(ii) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

* * *

(H) A person or persons 21 years of age or older have been designated to sign and do sign a special use application on behalf of the applicant.

The 1998 version:

36 CFR § 251.56 Terms and conditions.

(a) General. Each special use authorization shall contain:

* * *

(2) Such terms and conditions as the authorized officer deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands subject to use or adjacent thereto; (iii) protect other lawful users of the lands adjacent to or occupied by such use; (iv) protect lives and property; (v) protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (vi) require siting to cause least damage to the environment, taking into consideration feasibility

and other relevant factors; and (vii) otherwise protect the public interest.

The 1999 version contains exactly the same language, except that the numbers and letters denoting this section are different.

36 CFR § 261.10 Occupancy and use.

The following are prohibited:

* * *

(*l*) Use or occupancy of National Forest System land or facilities without special use authorization when such authorization is required.

APPENDIX C

1. The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 551 of Title 16 of the United States Code provides that:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of Section 471 of this Title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Section . . . or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in Section 3401(b) to (e) of Title 18.

3. The relevant portions of Part 251 and 261 of Title 36 of the Code of Federal Regulations provide as follows:

Note: The following sections are numbered as they were originally promulgated, *cf.* 60 Fed. Reg. 45,293-95 (August 30, 1995), because the courts below used those numbers. *See* App. 3a n. 2. A later recodification – non-substantive for relevant purposes – renumbered some of these sections, 63 Fed. Reg. 65949-69 (Nov. 30, 1998), so the current section numbers, where different, are specified in brackets.

§ 251.50 [same] Scope

(a) All uses of National Forest System lands, improvements, and resources, except those [concerning] . . . disposal of timber . . . and minerals . . . and the grazing of livestock . . . are designated "special uses." Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization from the authorized officer unless that requirement is waived by paragraph (c) of this section.

* * *

(c) A special use authorization is not required for noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating, as well as noncommercial activities involving the expression of views such as assemblies, meetings, demonstrations, and parades, except for:

* * *

(3) Noncommercial group uses as defined in § 251.51 of this subpart.

* * *

251.51 [same] Definitions

"Applicant" – any individual, partnership, corporation, association . . . which applies for a special use authorization.

"Authorized officer" – any employee of the Forest Service to whom has been delegated the authority to perform the duties described in this part.

* * *

"Group Use" – an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

"Holder" – any applicant who has received a special use authorization.

* * *

"National Forest System land" – all lands, waters, or interests therein administered by the Forest Service.

* * *

"Noncommercial use or activity" – any use or activity that does not involve a commercial use or activity.

"Permit" – a special use authorization which provides permission, without conveying an interest in land, to occupy and use National Forest System land or facili-

ties for specified purposes, and which is both revocable and terminable.

"Revocation" – the cessation of a special use authorization by action of an authorized officer before the end of the specified period of occupancy or use for reasons set forth in § 251.60(a)(1)(i) . . . of this subpart.

* * *

"Special use authorization" – a permit . . . . which allows occupancy, use, rights or privileges of National Forest System land.

* * *

§ 251.53 [same] Authorities.

Subject to any limitations contained in applicable statutes, the Chief of the Forest Service, or other Agency official to whom such authority is delegated, may issue special use authorizations for National Forest System land under the authorities cited and for the types of use specified in this section as follows:

(a) Permits governing occupancy and use, including group events and distribution of noncommercial printed materials, under the Act of June 4, 1897, 30 Stat. 35 (16 U.S.C. § 551).

* * *

§ 251.54 [see brackets *infra*] Proposal and application requirements and procedures.

* * *

(b) *Filing Proposals.* Proposals for special uses must be filed in writing with or presented orally to the District Ranger or Forest Supervisor having jurisdiction over the affected land . . .

* * *

[d] (e) *Proposal content* –

(1) *Proponent identification.* Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to receive notice of actions pertaining to the proposal.

(2) *Required information* –

(i) *Noncommercial group uses.* . . . A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

(B) The location and a description of the lands and facilities the proponent would like to use;

(C) The estimated number of participants and spectators;

(D) The starting and ending time and date of the proposed activity; and

(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.

* * *

[g] (f) *Application processing and response.*

* * *

[3] *Response to applications for noncommercial group uses.*

[i] (5) All applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses pursuant the determination as set forth below, unless applications are denied within 48 hours of receipt. Where an application for a noncommercial group use has been granted or is deemed to have been granted and an authorization has been issued under this paragraph, an authorized officer may revoke that authorization only as provided under § 251.60 (a)(1)(i).

[ii] (h)(1) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

* * *

[H] (viii) A person or persons 21 years of age or older have been designated to sign and do sign

a special use application on behalf of the applicant.

[iii] (2). . . A denial of an application under paragraphs (h)(1)(i) [(g)(3)(ii)(A)] through (h)(1)(viii) [(g)(3)(ii)(H)] of this section constitutes final agency action and is immediately subject to judicial review.

* * *

§ 251.56 [see brackets, *infra*] Terms and conditions.

(a) *General.* Each special use authorization shall contain:

* * *

[ii](2) Such terms and conditions as the authorized officer deems necessary to:

[A](i) protect Federal property and economic interests;

[B](ii) manage efficiently the lands subject to use or adjacent thereto;

[C](iii) protect other lawful users of the lands adjacent to or occupied by such use;

[D](iv) protect lives and property;

[E](v) protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;

[F](vi) require siting to cause least damage to the environment, taking into consideration feasibility and other relevant factors; and

[G](vii) otherwise protect the public interest.

* * *

§ 251.60 [same] Termination, revocation, and suspension.

(a) *Grounds for termination, revocation, and suspension.*

(1) *Noncommercial group uses.*

(i) *Revocation or suspension.* An authorized officer may revoke or suspend a special use authorization for a noncommercial group use only under one of the following circumstances:

(A) Under the criteria for which an application for a special use authorization may be denied under § 251.54(h)(1) [251.54(g)(3)(ii)];

(B) For noncompliance with applicable statutes or regulations or the terms and conditions of the authorization;

(C) For failure of the holder to exercise the rights or privileges granted; or

(D) With the consent of the holder.

(ii) *Administrative or judicial review.* Revocation or suspension of a special use authorization under this paragraph constitutes final agency action and is immediately subject to judicial review.

* * *

(b) For purposes of this section, the authorized officer is that person who issues the authorization or that officer's successor.

***

§ 261.1b [same] Penalty

Any violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both pursuant to title 16 U.S.C. section 551, unless otherwise provided.

§ 261.10 [see brackets *infra*] Occupancy and use.

The following are prohibited:

* * *

[k] (*l*) Use or occupancy of National Forest System land or facilities without special use authorization when such authorization is required.

[*l*] (m) Violating any term or condition of a special use authorization, contract or approved operating plan.

Supreme Court, U.S.
FILED
MAY 16 2001
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(2)

Nos. 00-1417 and 00-8512

In the Supreme Court of the United States

GARRICK BECK AND JOAN KALB, PETITIONERS

v.

UNITED STATES OF AMERICA

STEPHEN SEDLACKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether a regulation prohibiting the use or occupancy of National Forest System land without a required special use authorization, 36 C.F.R. 261.10(k), can be applied to individuals who had leadership roles in a noncommercial gathering that required a special use authorization under 36 C.F.R. 251.50, 251.51, because 75 or more people were involved in the activity.

2. Whether the Forest Service regulations requiring a special use authorization for noncommercial group uses are unconstitutionally vague or overbroad.

3. Whether the Forest Service regulations constitute a valid time, place, and manner restriction, or impose a prior restraint.

4. Whether the Forest Service regulations vest officials with unbridled discretion to impose terms and conditions on a special use authorization to protect the public interest and are, therefore, unconstitutional on their face.

5. Whether provisions for judicial review in the Forest Service regulations are constitutionally adequate.

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In the Supreme Court of the United States

No. 00-1417

GARRICK BECK AND JOAN KALB, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 00-8512

STEPHEN SEDLACKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (00-1417 Pet. App. 1a-19a) is reported at 234 F.3d 827. The opinion of the district court (00-1417 Pet. App. 20a-41a) is reported at 86 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2000. The petition for a writ of certiorari in No. 00-8512 was filed on February 12, 2001. The

petition for a writ of certiorari in No. 00-1417 was filed on March 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were charged by information with a misdemeanor for violation of 36 C.F.R. 261.10(k), which prohibits the use of National Forest System land without a special use authorization when such authorization is required, as it is for use by a group of 75 or more persons. See 36 C.F.R. 251.50(a) and (c)(3), 251.51. Petitioners contended that the regulations did not apply to them as individuals and were unconstitutional. After a two-day bench trial, the district court found each petitioner guilty as charged. 00-1417 Pet. App. 21a. The court imposed a three-month term of imprisonment and a $10 special assessment on each petitioner and, in addition, a $500 fine on petitioners Beck and Kalb. *Id.* at 4a; 00-1417 Pet. 3; 00-8512 Pet. 1. The district court stayed the imposition of sentence pending appeal. 00-1417 Pet. App. 4a. The court of appeals affirmed. *Id.* at 1a-19a.

1. Petitioners are members of the Rainbow Family, which is "an unincorporated, loosely structured group of individuals that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express and demonstrate their ideas and views." 00-1417 Pet. App. 3a n.1 (citation omitted). The members have gathered annually "on or around July 4 since 1972." *Ibid.* There are more than 20,000 participants at such gatherings, which "last for a month or more." *Ibid.* In addition, members attend smaller regional gatherings "through-

out the year in National Forests across the country." *Ibid.*

2. a. Federal regulations prohibit the "[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. 261.10(k). Pursuant to 36 C.F.R. 261.1b, a violation of Section 261.10(k) "shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both." See also 16 U.S.C. 551 (authorizing same sanctions).

b. Authorization for a "special use" of National Forest System lands or resources is required when the proposed use is noncommercial and involves a group of 75 or more people. See 36 C.F.R. 251.50, 251.51. A "special use" is defined as a use other than those specified in certain regulations governing the grazing of livestock and the disposal of timber and minerals. *Ibid.* Noncommercial activities are generally exempted from the special use authorization requirement. 36 C.F.R. 251.50(c). Noncommercial activities that constitute "group uses," however, are not exempt. 36 C.F.R. 251.50(c)(3). "Group use" is defined as "an activity * * * that involves a group of 75 or more people, either as participants or spectators." 36 C.F.R. 251.51. Thus, noncommercial group uses require a special use authorization.

Federal regulations presume that a special use authorization will be granted for a noncommercial group use. See 36 C.F.R. 251.54(h)(1) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(ii));[1] 60 Fed. Reg. 45,260,

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[1] Some of the relevant regulatory provisions were recodified in November 1998 as part of a general streamlining of the application process for special use authorizations. See 63 Fed. Reg. 65,950-65,969. Because the courts and the parties continue to refer to the

45,278 (1995). The regulations provide that the Forest Service "shall" grant an application for a special use authorization by a noncommercial group if the requested use meets specified content-neutral criteria concerning, *inter alia*, forest land management, environmental protection, and public health and safety. 36 C.F.R. 251.54(h)(1) (1998). The final criterion requires that "[a] person or persons 21 years of age or older have been designated to sign and do sign a special use authorization on behalf of the applicant." 36 C.F.R. 251.54(h)(1)(viii) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(ii)(H)).

The application for a special use authorization for a noncommercial group use "is a simple one-page document which essentially requires the applicant to supply information concerning the location and description of the National Forest System land upon which the activity will take place, the facilities that the applicant seeks to use, the estimated number of participants and spectators, the starting and ending times and dates for the proposed activity, and the name of an adult who will sign a special use authorization on behalf of the applicant." 00-1417 Pet. App. 4a; see 00-8512 Pet. App. E2-E3; 36 C.F.R. 251.54(e)(1) and (2)(i)(A)-(E) (1998) (recodified at 36 C.F.R. 251.54(d)(1) and (2)(i)(A)-(E)).

Federal regulations provide that "[a]ll applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses unless the applications are denied within 48 hours of

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1998 codification (see, *e.g.*, 00-1417 Pet. App. 3a n.2; 00-1417 Pet. 3 n.3), however, we also cite to the 1998 codification where the current codification is different. For the Court's ease of reference, the first time we cite the 1998 version of a provision, we also include a citation to where the section is found in the current codification.

receipt." 36 C.F.R. 251.54(f)(5) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(i)). Denial of any application must be provided in writing to the applicant and must provide the reasons for the denial. 36 C.F.R. 251.54(h)(2) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(iii)). If a Forest Service officer denies an application for failure to meet the regulatory criteria, but an alternative time, place, or manner would enable the proposed group use to meet the criteria, the officer must offer that alternative to the applicant. *Ibid.* The denial of a special use authorization for a noncommercial group use under these provisions constitutes final agency action that is subject to judicial review. *Ibid.*[2]

Revocation or suspension of a special use authorization for a noncommercial group is allowed only on certain listed grounds. 36 C.F.R. 251.60(a)(1)(i)(A)-(D). A revocation or suspension constitutes final agency action and is immediately subject to judicial review. 36 C.F.R. 251.60(a)(1)(ii).

Each special use authorization must contain listed terms and conditions, including ones designed to secure compliance with public health and safety laws and to protect the environment. 36 C.F.R. 251.56(a)(1)(i)-(iv)

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[2] If a noncommercial group use application is denied based solely on the criterion relating to the impact that the proposed activity would have on certain identified sensitive resources or lands (see 36 C.F.R. 251.54(h)(1)(iii) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(ii)(D)), and the alternatives offered are unacceptable to the applicant, the Forest Service must offer to complete the required environmental and other analyses for the requested site. 36 C.F.R. 251.54(h)(2) (1998). A decision to grant or deny the application for which such an environmental assessment is prepared shall be subject to administrative notice and appeal procedures and shall be made within 48 hours after the decision becomes final under that appeal process. *Ibid.*

(1998) (recodified at 36 C.F.R. 251.56(a)(1)(i)(A)-(D)). The Forest Service is authorized to impose additional terms and conditions deemed necessary to protect, *inter alia*, lives, property, federal property and economic interests, and otherwise to "protect the public interest." 36 C.F.R. 251.56(a)(2)(i)-(vii) (1998) (recodified at 36 C.F.R. 251.56(a)(1)(ii)(A)-(G)).[3]

3. a. "For a period of weeks during the summer of 1999 [late June and early July], some 20,000 people attended a Rainbow Family gathering in Pennsylvania's Allegheny National Forest." 00-1417 Pet. App. 3a (footnote omitted), 22a. Each of the three petitioners "was present at that gathering and was identified by a Forest Service criminal investigator as having had some role in organizing or administering the event." *Id.* at 3a.

The Rainbow Family failed to obtain the required special use authorization for a noncommercial group use. Each of the petitioners was advised by a Forest Service employee of the need for the Rainbow Family to apply for a special use permit, was asked to sign a special use authorization, and refused to do so. 00-1417 Pet. App. 4a, 31a. Each petitioner was issued a citation charging use of National Forest System land without a special use authorization, in violation of 36 C.F.R. 261.10(k). 00-1417 Pet. App. 3a, 22a. Petitioners were

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[3] On September 9, 1999, the Forest Service adopted an interpretive rule to make explicit that its intent, in the context of authorizing noncommercial group uses, was that the term "public interest" refer to the three public interests identified when the regulation was adopted in 1995: "the protection of resources and improvements on National Forest System lands, the allocation of space among potential or existing uses and activities, and public health and safety concerns." 64 Fed. Reg. 48,959-48,960; see 36 C.F.R. 251.56 note to para. (A)(1)(ii)(G).

subsequently charged by information with a misdemeanor for violation of 36 C.F.R. 261.10(k). 00-1417 Pet. App. 4a. Petitioners moved for judgments of acquittal, contending that the regulations do not apply to them as individuals and, alternatively, that the regulations are unconstitutional. *Id.* at 20a-21a.

b. After a two-day bench trial, the district court denied petitioners' motions for judgment of acquittal and found each petitioner guilty as charged. 00-1417 Pet. App. 21a. The court rejected petitioners' claim that the regulations do not apply to them as individuals because "they have not been designated by the Rainbow Family to act on the group's behalf." *Id.* at 31a. The court found that petitioners "had leadership roles as spokespersons for the Rainbow Family" and were "valid objects of prosecution." *Ibid.*; see also *id.* at 23a-31a (findings of fact on each petitioner's role in the event). The court noted that the Ninth Circuit had similarly rejected petitioners' argument in *Black* v. *Arthur*, 201 F.3d 1120 (2000). 00-1417 Pet. App. 31a.

The district court also rejected petitioners' First Amendment challenges to the regulations. 00-1417 Pet. App. 32a-37a. The court relied on the Fourth Circuit's ruling in *United States* v. *Johnson*, 159 F.3d 892 (1998), that the regulations impose constitutionally valid time, place, and manner restrictions. 00-1417 Pet. App. 33a-34a.

The district court also rejected the claim that the Forest Service regulations are facially unconstitutional under *United States* v. *Linick*, 195 F.3d 538 (9th Cir. 1999). 00-1417 Pet. App. 34a-37a. The court recognized that, in *Linick*, the Ninth Circuit affirmed the dismissal of citations against two Rainbow Family members arising out of a gathering in June 1998. The district court in *Linick* had ordered that the charges be

dismissed because the regulations allowed Forest Service officers to include in a special use authorization such terms and conditions as they deemed necessary to "protect the public interest," 36 C.F.R. 251.56(a)(2)(vii) (1998), a standard that, in the court's view, granted such officers "impermissibly broad discretion in violation of the First Amendment." 00-1417 Pet. App. 34a (quoting 195 F.3d at 541). Although the Ninth Circuit affirmed the dismissal of the charges in that case, it did not affirm the ruling that the regulation itself was unconstitutional. *Id.* at 36a. The court held that the interpretive rule (see note 3, *supra*) issued by the Forest Service in September 1999 (after the gathering at issue in *Linick*) preserved the constitutionality of the regulatory scheme "because the scheme now satisfies the three-part test for time-place-manner regulation." *Id.* at 35a (quoting 195 F.3d at 543).

The district court in the instant case recognized that, as in *Linick*, the Rainbow Family gathering for which petitioners failed to obtain a special use authorization occurred before issuance of the September 1999 interpretive rule, but the court disagreed with the Ninth Circuit's conclusion that the pre-September 1999 regulation was invalid. It held that, even without the interpretive ruling, "the regulation was clearly intended to regulate conduct relative to public health and safety, not speech or expression." 00-1417 Pet. App. 36a-37a.

c. The district court imposed a sentence of three months' imprisonment and a $10 special assessment on each petitioner, and a $500 fine on petitioners Beck and Kalb. 00-1417 Pet. App. 4a; 00-1417 Pet. 3; 00-8512 Pet. 1. The court stayed the sentences pending appeal. 00-1417 Pet. App. 4a.

4. The court of appeals affirmed, holding that "the challenged regulations were properly applied to the individual [petitioners] and do not transgress constitutional requirements." 00-1417 Pet. App. 2a.

a. The court first held that the challenged regulations do not criminalize only conduct by groups and that individuals can be prosecuted for violating them. 00-1417 Pet. App. 5a-6a. The court relied on *Johnson*, *supra*, in which the Fourth Circuit held that "proof of a violation of section 261.10(k) 'requires the government to demonstrate: 1) use, 2) of National Forest land, 3) by a noncommercial group of 75 or more persons, either as participants or spectators, 4) without special use authorization.'" 00-1417 Pet. App. 5a (quoting *Johnson*, 159 F.3d at 894). The court held that the record in this case demonstrates that each of the requirements was satisfied with respect to each petitioner, that each petitioner knew of the permit requirement, that the gathering was large enough to trigger that requirement, and that an application had not been made. *Id.* at 6a. The court concluded that, "[t]o read the regulation and the penalty for its violation as inapplicable to individuals who use the National Forest System as part of a group, with deliberate disregard for the group permit requirement, would effectively eviscerate the special use authorization process." *Ibid.*

b. The court of appeals rejected petitioners' various First Amendment challenges. 00-1417 Pet. App. 6a-18a. The court held that the regulations are not unconstitutionally vague or overbroad because, unlike the ordinance in *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (opinion of Stevens, J.), they clearly define the conduct prohibited and do not foster uncertainty. 00-1417 Pet. App. 7a. The court next held that the requirement that a special use authorization be signed

by a member of the group is a valid time, place, and manner requirement. First, the court noted, the requirement is indisputably content-neutral and serves three valid purposes identified by the Fourth Circuit in *Johnson* and by the Forest Service—to "(1) 'protect resources and improvements on National Forest System lands,' (2) 'allocate space among potential or existing uses and activities,' and (3) 'address concerns of public health and safety.'" *Id.* at 9a (quoting *Johnson*, 159 F.3d at 895, and 60 Fed. Reg. at 45,258, 45,262). Second, the signature requirement in the regulations is tailored to serve those purposes, because that requirement "is necessary to ensure that the group will be responsible for the actions of its members as a whole, to give the authorization legal effect and to subject the group to the authorization's terms and conditions." *Id.* at 10a (quoting *United States* v. *Masel*, 54 F. Supp. 2d 903, 919 (1999) (opinion of magistrate judge), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000)). Third, the signature requirement leaves open ample alternative channels for communication because the regulations do not preclude the Rainbow Family from using state or private property or other federal land, or from gathering in groups of fewer than 75 individuals, without obtaining a special use authorization. *Ibid.*[4]

The court of appeals rejected petitioners' challenge to the validity of 36 C.F.R. 251.56, which allows the Forest

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[4] The court rejected (00-1417 Pet. App. 11a n.6) petitioners' argument that, because the Rainbow Family is loosely organized, it was legally impossible for petitioners to sign a special use authorization on behalf of the group. The court noted that the argument has been rejected by other courts and that the attendees could have designated someone to sign the authorization on behalf of the group. *Ibid.*

Service to attach terms and conditions to a special use authorization, because petitioners did not apply for (and did not receive) a special use authorization and the terms-and-conditions provision therefore was never applied to them. 00-1417 Pet. App. 11a-12a. The court held that the terms-and-conditions provision is not susceptible to facial challenge by petitioners because its relationship to expressive conduct is, "at best, incidental." *Id.* at 14a. The court reasoned that the terms-and-conditions provision is applicable to all special use authorizations, whether recreational, expressive or for any other special use, and is not applicable to use of National Forests for expressive purposes if fewer than 75 people are involved. Thus, the provision is "directed not at expression, but at the congregation of large numbers of people in the forest." *Ibid.* (quoting *Masel*, 54 F. Supp. 2d at 913).

The court of appeals further noted that, even if it were to entertain a facial challenge, it would hold that "the regulation, as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression." 00-1417 Pet. App. 15a (citing 60 Fed. Reg. at 45,262, which identifies the government's three-fold interest in protecting resources, allocating space, and addressing public health and safety concerns). The court also noted its disagreement with the Ninth Circuit's ruling in *Linick* that the terms-and-conditions provision was invalid before the September 1999 interpretive rule. *Id.* at 17a n.9.

Finally, the court of appeals rejected petitioners' argument that the regulatory scheme is unconstitutional on its face because it does not provide for immediate judicial review of overly restrictive terms and conditions. The court held that the government's

interpretation of its regulations to allow immediate judicial review of terms and conditions is reasonable and entitled to controlling weight. 00-1417 Pet. App. 18a.

ARGUMENT

Petitioners maintain that the Forest Service regulations requiring a special use authorization for noncommercial group uses of National Forest System lands cannot be applied to them as individuals and violate the First Amendment. The court of appeals correctly rejected those arguments, and they do not warrant review by this Court.

1. The court of appeals correctly rejected the claim (00-8512 Pet. 6-12) that the challenged regulations are inapplicable to individuals. Indeed, the court of appeals emphasized (00-1417 Pet. App. 5a) that "[n]ot one court considering the application of 36 C.F.R. § 261.10[(k)] has hesitated to apply that section to individual defendants,"[5] and petitioners do not cite any contrary authority.

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[5] See *United States* v. *Johnson*, 159 F.3d 892 (4th Cir. 1998) (upholding convictions of four individuals for using or occupying National Forest System lands, as part of Rainbow Family gathering of 75 or more people, without special use authorization); *United States* v. *McFadden*, 71 F. Supp. 2d 962 (W.D. Mo. 1999) (rejecting First Amendment challenges and denying motion to dismiss by two individual defendants charged with misdemeanor violation of 36 C.F.R. 261.10(k)); *United States* v. *Masel*, 54 F. Supp. 2d 903, 920- 921 (1999) (opinion of magistrate judge) (denying motion to dismiss by individual defendant charged with misdemeanor violation of 36 C.F.R. 261.10(k), despite defendant's claim that it was legally impossible for him to sign an application as a representative of the Rainbow Family gathering because he would be making a false statement), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).

Petitioner Sedlacko is mistaken in claiming (00-8512 Pet. 6, 7, 13) that his challenge to the applicability of the regulation to individuals was "overlooked" and not addressed "directly" below. The court of appeals specifically quoted and rejected petitioner's claim that the regulation has no *actus reus* element that can be committed by an individual. 00-1417 Pet. App. 5a. The *actus reus* is the "[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. 261.10(k). Where a special use authorization is required because the proposed use is a group use, individuals do not violate Section 261.10(k) if they are not part of the group activity. But that is because the requirement for a special use authorization regulates the use and occupancy of National Forest System lands by individuals acting together in groups. As explained above (see p. 9, *supra*), the court of appeals adopted the Fourth Circuit's four-factor description of the proof necessary to establish a violation of 36 C.F.R. 261.10(k) (see 00-1417 Pet. App. 5a) and expressly held that "it is unnecessary that the statute specifically set forth the individual as the actor as opposed to the group * * *. The liability of an individual—or a group—occurs when the four requirements of the statute are proven." *Ibid.*

Petitioner Sedlacko's claim (00-8512 Pet. 9) that he "had no power to conform his conduct to the requirements" of the regulation also was specifically rejected by the court of appeals, which pointed out how petitioners could have avoided liability under the regulations by opting out of the gathering and that there was no indication that the Rainbow Family itself was under any imperative to gather on National Forest

System lands rather than elsewhere. 00-1417 Pet. App. 6a.[6]

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[6] The cases cited by petitioner Sedlacko regarding legal impossibilities do not support review by this Court. See 00-8512 Pet. 9 (citing *United States* v. *Dalton*, 960 F.2d 121 (10th Cir. 1992), and *United States* v. *Spingola*, 464 F.2d 909 (7th Cir. 1972)). *Dalton* has subsequently been limited by the Tenth Circuit and has been rejected by various other Circuits. See *United States* v. *Rivera*, 58 F.3d 600, 601-602 (11th Cir. 1995). In *Dalton*, the court held that a defendant could not stand convicted of possessing and transferring an unregistered firearm at a time when the government would not permit registration of the kind of firearm in the defendant's possession, because, according to the court, the prohibition against registering that type of firearm made compliance with the registration requirement impossible. By contrast, no law made it impossible for petitioner to comply with the Forest Service regulations. The only reason that petitioner claims (00-8512 Pet. 9) he could not comply with 36 C.F.R. 261.10(k) is that the Rainbow Family did not designate anyone to sign the special use authorization. As the court of appeals found, however, petitioner "could have avoided liability under the regulations by opting not to participate in the gathering on National Forest land where it was clear that a special use authorization was required and had not been granted." 00-1417 Pet. App. 6a; cf. *Rivera*, 58 F.3d at 602.

In *Spingola*, the court reversed the conviction of the secretary-treasurer of a union for failure to timely file certain annual financial reports on behalf of the union, based on the erroneous exclusion of exculpatory evidence relating to the defendant's claim of a lack of willfulness because of physical impossibility because he was unable to compel others to timely prepare accounting records that were necessary prerequisites to his filing the financial reports. 464 F.2d at 911-912. The defendant, by virtue of his office, was under a statutory obligation to timely file the reports. *Id.* at 910-911 (citing 29 U.S.C. 431(b)). By contrast, petitioners were not under any legal compulsion to participate in the Rainbow Family gathering that they knew was being held on National Forest System land without a required special use authorization.

2. The court of appeals' holding that the Forest Service regulations are not unconstitutionally vague or overbroad is correct and consistent with *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). See 00-8512 Pet. 12-16. As the court of appeals explained, "[u]nlike the ordinance at issue in *Morales*, the regulations clearly define what conduct is prohibited" and there is no need for speculation. 00-1417 Pet. App. 7a. The court also correctly rejected petitioners' attempt (see 00-8512 Pet. 14) to challenge the regulations as unconstitutionally overbroad on their face, because the regulations are not aimed at expression and are not closely enough connected to expression to justify "the 'extraordinary doctrine' that permits facial challenges." 00-1417 Pet. App. 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)).[7]

3. Petitioners err in contending that the Forest Service's special-use regulations governing noncommercial group uses (including, in particular, the signature requirement) do not constitute a valid time, place, and manner restriction (00-1417 Pet. 21-24; 00-8512 Pet. 16-21), and that the regulatory scheme imposes an unlawful prior restraint (00-1417 Pet. 10-12, 21-29).

The court of appeals, consistent with the Fourth Circuit, correctly upheld the regulatory scheme as a valid time, place and manner restriction. See *United States* v. *Johnson*, 159 F.3d 892, 895-896 (1998); see also *United States* v. *McFadden*, 71 F. Supp. 2d 962, 964-965

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[7] In addition, petitioner Sedlacko's concern (0-8512 Pet. 11-12, 14-16) that members of the media or townspeople who are not part of the Rainbow Family gathering might be arrested for violating the regulation is unwarranted because such individuals who "do not arrive as part of a particular group or in connection with an organized activity" are not involved in the group use as participants or spectators. See 60 Fed. Reg. 45,270 (1995).

(W.D. Mo. 1999); *United States* v. *Masel*, 54 F. Supp. 2d 903, 914-920 (1999) (opinion of magistrate judge), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000). The regulatory scheme, including the signature requirement, is content neutral. The special-use authorization requirement does not apply to gatherings involving fewer than 75 people, and it applies to all noncommercial uses involving 75 or more people, regardless of the content or viewpoint of any speech involved.[8] The generally-applicable nature of the requirement and the fact that it is not aimed at expression or related conduct also means that it is not a presumptively invalid prior restraint. *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 760-761 (1988).

The regulations are narrowly tailored to serve legitimate governmental purposes. The Forest Service "established three significant interests in promulgating this rule: (1) Protection of forest resources and facilities; (2) promotion of public health and safety; and (3) allocation of space in the face of greater competition for the use of National Forest System lands." 60 Fed. Reg. 45,262 (1995); *id.* at 45,258. The courts below correctly found that those legitimate interests justify the regulations. See 00-1417 Pet. App. 9a-10a, 33a; see also *Johnson*, 159 F.3d at 895. The courts below also correctly held that the regulations serve those interests "in a narrowly tailored manner by providing a minimally intrusive system to notify Forest Service per-

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[8] That the signature requirement may have an incidental effect on groups that do not want to designate a representative to sign the authorization does not render the requirement content-based. See *Ward* v. *Rock Against Racism*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

sonnel of any large groups that will be using the forest so that the personnel, through advance preparation, can minimize any damage that may occur." 00-1417 Pet. App. 9a, 33a (quoting *Johnson*, 159 F.3d at 896).

Petitioners' suggestion that the government must adopt an alternative regulatory scheme that is, in petitioners' view, more narrowly drawn (00-8512 Pet. 20), is without merit. In *Ward*, this Court held that time, place, and manner restrictions need not be the "least intrusive means" of achieving the government's interests to survive constitutional attack. 491 U.S. at 789-790. Rather, the test for narrow tailoring in this context is whether the government "could reasonably have determined that its interests overall would be served less effectively without [the regulation] than with it." *Id.* at 801. The court of appeals correctly held that the Forest Service's interests would be less effectively served by a regulatory scheme that did not include the signature requirement. See 00-1417 Pet. App. 9a-10a.

The regulatory scheme leaves open ample alternative channels for communication because it does not preclude petitioners and others from using other land not subject to National Forest System regulations as the location for their gatherings of 75 or more people. It also does not preclude them from gathering on National Forest System land, without obtaining a special use authorization, if the people involved number fewer than 75.

4. Petitioners urge the Court (00-8512 Pet. 22-23) to grant review to resolve the disagreement between the court below and the Ninth Circuit in *United States* v. *Linick*, 195 F.3d 538 (1999), on whether Forest Service officers are unconstitutionally granted unbridled discretion under 36 C.F.R. 251.56(a)(2)(vii) (1998), which

allows them to impose on a special use authorization a term or condition that is needed to "protect the public interest."

a. As the court of appeals pointed out, petitioners never sought or obtained a special use authorization and, therefore, were never subject to the imposition of any term or condition under 36 C.F.R. 251.56(a)(2)(vii) (1998). Furthermore, a facial challenge to the provision is not warranted because it does not have "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood*, 486 U.S. at 759. As the court of appeals concluded, the relationship between the terms-and-conditions provision and any expressive conduct "is, at best, incidental." 00-1417 Pet. App. 14a. Section 251.56 "does not target First Amendment activities" and is "not directed narrowly and specifically at expression or conduct commonly associated with expression." *Ibid.* (quoting *Masel*, 54 F. Supp. 2d at 912). The provision applies with "equal force to recreational, expressive and all other special uses of the forest." *Ibid.* Thus, under *Lakewood*, the "'terms and conditions' provision 'provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.'" *Ibid.* (court's alteration).

b. In any event, the court of appeals correctly held that Section 251.56(a)(2)(vii), "as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression." 00-1417 Pet. App. 15a. "Since 1995, the Forest Service has consistently taken the position that discretion granted to it under the regulations may only be used to further the government's threefold interest in regulating non-

commercial group use of forest land: (1) 'protect[ing] resources and improvements on National Forest System lands;' (2) 'allocat[ing] space among potential or existing uses or activities;' and (3) 'addressing concerns of public health and safety.'" *Id.* at 16a (quoting 60 Fed. Reg. at 45,262 (court's alteration)). It was entirely appropriate for the court of appeals to adopt the agency's narrowing construction of its own regulation in a manner that avoids any First Amendment issue.

Petitioners correctly note (00-8512 Pet. 22) that that ruling is inconsistent with the Ninth Circuit's decision in *Linick* that affirmed the dismissal of charges under 36 C.F.R. 251.56(a)(2)(vii) (1998) based on the conclusion that the regulation's allowance for imposition of terms and conditions "to protect the public interest" was unconstitutionally overbroad on its face. 195 F.3d at 541-542. That disagreement does not warrant review by this Court, however, because the Ninth Circuit also ruled in *Linick* that the interpretive rule issued by the Forest Service in 1999 (see note 3, *supra*) remedied the flaw the Ninth Circuit had identified. The Ninth Circuit explained that the interpretive rule limits the Forest Service's discretion to imposing terms and conditions that are designed to further "the three public interests identified by the Forest Service in promulgating the noncommercial group use rule, i.e., the need to address concerns of public health and safety, to minimize damage to National Forest System resources, and to allocate space among actual or potential uses and activities." 195 F.3d at 542 (quoting 64 Fed. Reg. 48,959 (1999)). The Ninth Circuit held that, based on that interpretation, Section 251.56(a)(2)(vii) now satisfies

the time, place, and manner standard. *Id.* at 542-543.[9] Thus, the Ninth Circuit has made clear that it would rule in accord with the court of appeals in this case in any case arising after September 1999, thereby rendering the disagreement concerning prior conduct of no ongoing significance.

5. Petitioners contend (00-1417 Pet. 13-21, 26-27) that the regulations do not provide for "prompt judicial review" as required under *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965), and therefore impose an unconstitutional prior restraint. Petitioners assert that the Court should grant review to resolve disagreement among lower courts regarding whether mere access to judicial review satisfies that requirement (00-1417 Pet. 13-16), and whether the government bears the burden of obtaining judicial review (*id.* at 17-21). Petitioners did not advance those arguments below. Instead, they argued that the judicial review provided by the regulatory scheme was inadequate because, according to their interpretation of the regulations, they had to exhaust an administrative appeals process before seeking judicial review. See C.A. Br. of Beck and Kalb

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[9] As the court of appeals correctly found, that was the interpretation intended by the Forest Service from the outset. When the Forest Service issued its 1999 interpretive rule, it emphasized that it viewed the rule simply as a restatement of its preexisting interpretation. The Forest Service explained that it was issuing the rule only "[o]ut of an abundance of caution" because, "[d]espite the clarity of the existing regulation" that limited the discretion of officers to impose terms and conditions in noncommercial group use permits to the three public interests identified by the Forest Service when it promulgated the regulation, some confusion had persisted with respect to the amount of discretion allowed. 64 Fed. Reg. at 48,959. The Forest Service emphasized that the interpretive rule was to make "explicit preexisting law." *Ibid.*

25, 30-34. The court of appeals, however, correctly adopted the government's interpretation of its own regulations, under which immediate judicial review is available to challenge the imposition of terms and conditions on a special use authorization for a noncommercial group use. 00-1417 Pet. App. 18a; see also 36 C.F.R. 251.54(h)(2) (1998) (denial of special use authorization for noncommercial group use is immediately subject to judicial review); 36 C.F.R. 251.60(a)(1)(ii) (revocation or suspension of a special use authorization for noncommercial group use is immediately subject to judicial review). The Court should decline to consider petitioners' new arguments. See, *e.g.*, *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999) ("Because this argument was neither raised nor considered below, we decline to consider it."). In any event, this case would not be an appropriate vehicle for resolving any disagreements among other circuits regarding the applicable legal standards, both because the court of appeals did not address those issues and because the regulations in this case are not addressed to expressive activities, as in *Freedman* and its progeny, but rather apply generally to group use of National Forest lands for any noncommercial activity.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 00-1417

IN THE

Supreme Court of the United States

GARRICK BECK AND JOAN KALB,

Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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In the Supreme Court of the United States

GARRICK BECK AND JOAN KALB,

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UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals
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ARGUMENT IN REPLY

The First Amendment Prohibits the Enforcement of the Forest Service's Noncommercial Group Use Regulations Against the Expressive and Religious Gatherings Which the Plaintiffs Attend.

In its brief in opposition, the United States devotes most of its attention to conceding the facts as recited by the Petitioners, Br. Opp. at 2-12, and then to responding to the arguments raised by Steven Sedlacko, the Petitioner in No. 00-8512, *Id.* at 12-15, 17-20. When it finally does turn its attention to the challenges advanced by Garrick Beck and Joan Kalb, the Petitioners in No. 00-1417,[1] *Id.* at 15-17,20-21, the government largely mischaracterizes those arguments and almost entirely ignores their important details. The Petitioners in No. 00-1417 now submit the following reply to the arguments which the government has offered in response to their petition for certiorari.

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[1] After Beck and Kalb filed their petition in No. 00-1417, Steven Sedlacko joined in the arguments presented therein.

A. The Challenged Regulations Cannot Stand as Time, Place, and Manner Restrictions Because the Authorization Signature Requirement Is Substantially More Burdensome than Necessary to Achieve Any Legitimate Governmental Objective.

In defending the challenged administrative regulations as valid restrictions on the time, place, and manner of the Petitioners' expression and religious worship, the United States recites its interests in the "(1) [p]rotection of forest resources and facilities; (2) promotion of public health and safety; and (3) allocation of space in the face of greater competition for the use of National Forest System lands." Br. Opp. at 16, *citing* 60 Fed. Reg. 45,262, 45,258. Yet the government never even begins to connect those interests with the particular feature of the permit system challenged here: the requirement that some individual sign the special use authorization itself. 00-1417 Pet. at 22-23. That is, the challenged regulations require that an "agent of the [using] group," 60 Fed. Reg. 45,274, sign the issued permit as opposed to an application for the permit, an operating plan, or other official paperwork. 36 C.F.R. § 251.54(e)(2)(i) [§ 251.54 (g)(3)(ii) (H)].[2] Not only does the government fail to offer any content-neutral interest in support of *this particular* requirement here, *cf.* 00-1417 Pet. at 23, it entirely ignores the reasons why Petitioners assert that the authorization signature requirement burdens "substantially more speech than is necessary to further the government's legitimate interests." 00-1417 Pet. at 23, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1988).[3]

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[2] See 00-1417 Pet. at 3 n. 3 and Br. Opp. 3-4 n. 1 concerning the non-substantive renumbering of some of the relevant administrative regulations after this case arose.

[3] As the Petitioners have already noted, 00-1417 Pet. at 23, they agree with the government, *cf.* Br. Opp. at 17, that the challenged authoriza-

As the court of appeals below recognized, 00-1417 Pet. App. 10a, there is one interest uniquely served by the authorization signature requirement, but it is just this interest – and the manner in which it is implemented in the challenged regulations – which imposes the serious burden about which the Petitioners complain in this case. The government uses the required signature to bind the group to the terms and conditions which it enumerates on the written authorization. 00-1417 Pet. App. 10a, *citing United States v. Masel*, 54 F. Supp. 2d 903, 919; *see also* 60 Fed. Reg. 45,274, 45,286. The government obviously needs no actual individual or group consent before it can enforce its generally applicable laws and regulations. Therefore the terms and conditions placed on the authorization must necessarily impose *new* group liabilities over and above those already imposed by law. Furthermore, since groups act only through individuals, this new group liability will be vicarious in a very real sense.

But two features of this scheme raise fatal constitutional problems which the government now ignores and which the courts below left altogether unaddressed. First, the content of the enumerated terms and conditions, while no

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tion signature requirement does not fail the narrow tailoring prong of the applicable constitutional test *merely* because it does not reflect the "least intrusive means" of serving the government's interest. But even under the time, place, and manner test, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1988)(footnote omitted). Neither the United States nor the courts below ever specified why the interests which the government recites here "would be served less effectively" by, for instance, an *application* signature requirement, *cf.* 00-1417 Pet. at 23, and neither ever addressed the Petitioners' argument that the authorization signature requirement imposes a serious and altogether unnecessary chilling effect upon expression and religious worship of the Petitioners and those with whom they would gather.

longer wholly unconstrained by regulation,[4] can nevertheless vary without limitation from case to case.[5] The substantive liability arising from an authorization signature may thus differ at different times and for different groups, and nothing in the regulations or in this record specifies how, if at all, these differences will relate to any objective differences in circumstance. Second, the nature and extent of this new group liability is altogether undefined. This is particularly problematic in light of the vicarious nature of the group liability; for nothing in the regulations or in this record defines the circumstances or extent to which the using group will be responsible for the acts of individuals participating in the authorized group use.

This Court has consistently recognized that the threat of vicarious liability can seriously chill expression and expressive association. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982); *Healy v. James*, 408 U.S. 169, 186-87 (1972); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960); *DeJonge v. State of Oregon*, 299 U.S. 353, 365 (1937). For this reason, the First Amendment demands "precision of regulation" where group liability is imposed in an expressive setting. *Claiborne Hardware* at 916; *see also Id.* at 919; *Noto v. United States*, 367 U.S. 290, 299-300 (1961). "In this sensitive field, the [government] may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* at 488. Even if the government has some legitimate interest in imposing a new, non-general, and potentially variable liability on group users of National Forest System lands, the present authorization signature

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[4] *See infra* at 9 n. 8.

[5] This feature also raises insurmountable constitutional difficulties when the challenged permit requirement is evaluated, as it must be, as a prior restraint upon expression. *See infra* at 8 n. 7.

requirement falls far of the constitutionally required "precision of regulation." It cannot be used to impose this sort of liability on those who, like the Petitioners, use the National Forest for expressive association and religious worship.

The Ninth Circuit has recognized the foregoing difficulties in this context, and it has interpreted the challenged authorization signature requirement to minimize them. "As we construe the regulation (and as the government agreed at oral argument), the only group liability provided under the regulation for failure to comply with the permit is revocation and suspension of the permit." *Black v. Arthur*, 201 F.3d 1120, 1123 (9th Cir. 2000). Yet the Third Circuit saw no reason to so limit the challenged regulation in this case. Even after expressly reciting the government's interest in using the authorization signature requirement to impose a group liability, 00-1417 Pet. App. 10a, it entirely ignored the chilling effect engendered by that undefined liability.

For its part, the government, after expressly conceding a saving construction before the Ninth Circuit, sought to avoid a similar result below. Perhaps it recognized that such a concession was inconsistent with the 'hold harmless' and money damage clauses which the Forest Service had included as terms and conditions in the authorization tendered for signature to each of the Petitioners in No. 00-1417. Gov. Ex. 6 at 3 cl. 9, 10; *cf.* 00-1417 Pet. App. 29a-30a. As a result, the terms and conditions enumerated on a written group use authorization can now vary from place to place. In some western states, the authorization signature requirement means one thing while in the Third and Fourth Circuits, *cf. United States v. Johnson*, 159 F.3d 892 (4th Cir. 1998), and in some midwestern states, *United States v. Masel*, 54 F. Supp. 2d 903 (W.D. Wis. 1999); *United States v. McFadden*, 71 F. Supp. 2d 962 (W.D. Mo.

1999), the requirement is less limited and potentially more menacing.[6] Thus while the government argues, Br. Opp. at 19-20, that the decision below is not meaningfully inconsistent with *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999), in light of the regulations adopted on September 9, 1999, 64 Fed. Reg. 48,959, it has totally failed to address the on-going and very troublesome inconsistency with *Black*.

B. The Challenged Regulations Impose an Invalid Prior Restraint Because, in a Number of Subtle Ways, they Leave Forest Service Officials with Impermissibly Broad Substantive and Procedural Discretion in Determining Whether and How to Permit Expression.

Even if the administrative regulations challenged here could survive the constitutional scrutiny which properly applies to mere time, place, and manner restrictions on expression, they would nevertheless fail to pass muster as prior restraints. In its brief in opposition, the United States does not dispute the Petitioners' observation that,

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[6] In light of the fact that several Rainbow Gatherings traditionally occur throughout the country each year, 00-1417 Pet. App. 21a, the present split among the lower courts runs the risk of skewing the location of future gatherings toward the western states, depriving those living in the east and less able to travel of their religious and expressive association. The government's response that Petitioners and others can gather on private land, Br. Opp. at 17, fails to establish that ample alternate avenues of expression are available within the meaning of the constitutional time, place, and manner test. This Court has already rejected the attempt by a government to redirect presumptively protected expression elsewhere by promulgating a time, place, and manner regulation which precludes expressive use of land within its jurisdiction. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76 (1981)(municipality could not rely on other jurisdictions to permit zoning of live entertainment); *Schneider v. State*, 308 U.S. 147, 163 (1939)(handbilling cannot be banned on streets and sidewalks even if not prohibited elsewhere).

where the government seeks to regulate the time, place, and manner of expression by requiring prior permission on a case by case basis, its regulations must pass muster under *both* the time, place, and manner standards *and* the stricter constitutional tests governing prior restraint. *Cf.* 00-1417 Pet. at 20, 22, *citing Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), *and FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990).

The government also largely refrains from addressing the substantive prior restraint challenges which the Petitioners in No. 00-1417 direct against the procedural regulations governing agency processing of applications and administration of authorizations. The government offers no response, for instance, to the Petitioners' observation that the challenged regulations only *appear* to fetter the Forest Service's procedural discretion since they allow licensing officials to undo at any time that which the regulations require them to do promptly in the first place. 00-1417 Pet. at 25-26, *citing* 36 CFR § 251.54(f)(5) [§ 251.54(g)(3)(i)] (requiring very prompt decision on application) *and* 36 CFR §§ 251.54(f)(5) [§ 251.54(g)(3)(i)], 251.60 (a)(1)(i) (permitting subsequent revocation of authorization for any reason which would have supported initial denial). Such provisions merely *hide* administrative discretion; they do not *fetter* it. The Constitution requires that the government do more than play clever games.

The government responds to the Petitioners' prior restraint challenges almost entirely by suggesting that the administrative regulations at issue here do not erect the sort of scheme which is subject to a facial constitutional challenge. From this premise, it concludes that the present Petitioners cannot challenge the procedures governing the application and administration of noncommercial group use authorizations because they never applied for such an authorization in the first place.

In support of this suggestion, the government observes, Br. Opp. at 18, that the permit requirement at issue here is not directed *solely* at expression. In the first place, this argument ignores the fact, already raised by the Petitioners here, 00-1417 Pet. at 3, 11-12, that the final administrative rule-making analysis leaves it unmistakably clear that the government deliberately *designed* this very permit requirement to regulate expressive group uses. *Cf.* 60 Fed. Reg. 45,257-89 (citing First Amendment cases and almost exclusively discussing expressive noncommercial group uses). Beyond this, the government errs in assuming that constitutional prior restraint scrutiny is restricted to legislation which affects expression alone. *Fort Wayne Books, Inc. v. State of Indiana*, 489 U.S. 46 (1989)(invalidating, as unconstitutional prior restraint, use of pretrial attachment of expressive materials in advance of RICO-type forfeiture proceedings even though such attachment of other items is unproblematic). While it is certainly possible to imagine some noncommercial group uses of National Forest System lands which are non-expressive, the courts below had no reason to believe that such uses form a substantial part of what the challenged permit requirement actually regulates. Nor has the government suggested as much here even after these Petitioners specifically raised this issue in their petition for certiorari. 00-1417 Pet. at 12.

Where, as here, it has not been shown that non-expressive activities predominate in a particular licensing category, this Court has long recognized that administrative power to impose permit conditions on a case by case basis[7] provides a constitutionally intolerable opportunity to

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[7] As suggested *supra* at 4 n. 5, the fact that licensing officials can vary a using group's monetary liability on a case by case basis poses a prior restraint problem which is at least as serious as the potential variation of a parade license fee from case to case. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

burden expression because of its content. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988). Such a scheme is the very opposite of legislation, such as a building permit requirement, which provides "too blunt an instrument" to effectively censor speech. *Cf.* Br. Opp. at 18. The Petitioners are fully entitled to challenge this permit requirement on its face.[8]

C. The Challenged Regulations Impose an Invalid Prior Restraint Because they Fail To Provide for the Prompt Judicial Review Which the First Amendment Requires Following the Denial of a License Necessary for Expression.

The government argues that, because the challenged regulations expressly provide that denial or revocation of an authorization is final agency action, *see* 00-1417 Pet. App. at 18a, the permit scheme satisfies the requirement, articulated in *Freedman v. State of Maryland*, 380 U.S. 51, 58-59 (1965), that adverse administrative action be subject to "prompt judicial review." Br. Opp. at 20-21. Yet since the regulations do nothing but permit a disappointed applicant to file a court action, they simply do not respond to the need for a reasonably prompt judicial *determination* of the propriety of a permit denial or revocation. *Cf. National*

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[8] Because the Petitioners are entitled to a facial challenge here, their convictions and sentences in this case cannot be upheld on the basis of a subsequently articulated construction which narrows administrative discretion to within constitutionally permissible limits. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 135-58 (1969). Whether or not the government properly characterizes it as merely "interpretive," the September 9, 1999 regulatory amendment, 64 Fed. Reg. 48,959, cannot influence the constitutional analysis in this case since it came *after* the citations were issued in this case, *see* 00-1417 Pet App. at 36a, and since this case involves a purely retrospective sanction (*i.e.* 3 months' incarceration and fines), as opposed to prospective injunctive or declaratory relief.

Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

The government asserts that the Petitioners did not raise this issue below. Br. Opp. at 20. Yet their appellate brief expressly argued that the "Forest Service regulations are devoid of prompt and meaningful judicial review." C.A. Br. of Beck and Kalb at 25. To be sure, the parties also disputed how quickly a disappointed applicant could get into court, *cf.* 00-1417 Pet. App. at 18a, and the court of appeals entirely rejected the need for any prior restraint protections at all. *Id.* at 15a, 17a. But this does not mean that the Petitioners are not entitled to seek full and proper prior restraint analysis from this Court. This Court has now granted certiorari in *Thomas v. Chicago Park District*, No. 00-1249, in order to determine, *inter alia*, just how a speech-licensing scheme must provide for prompt judicial review. The Petitioners here are entitled to a final judgment in accord with this Court's decision on this matter.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that this Court issue a writ of certiorari in order to review these Petitioners' convictions, fines, and 3-month jail sentences for gathering in a National Forest to speak and pray without prior special use authorization.

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